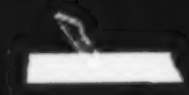
# Petition



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No. ———

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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LOCAL LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED TECHNOLOGIES CORPORATION,
*Respondents.*

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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## QUESTIONS PRESENTED

1. Does an employer's policy of filling jobs which became available by transfer, promotion, and demotion of "active" employees, wherever possible, rather than by recalling qualified strikers, despite the latter's seniority, when that policy is not shown or found to be justified by any legitimate and substantial business consideration, violate Sections 8(a)(1) and (3) of the NLRA?

2. Was it lawful for the Board to consider the legality of the employer's policy only with respect to 72 strikers who had received relief in a related district court proceeding, (governed by a different court of appeals mandate), and thereby deny relief to over 3,000 other identically situated unrecalled strikers?

3. Was recall of non-striker absentees (*i.e.*, non-strikers who were absent for more than a week during the strike), and placement of apprentices in preference to senior unrecalled strikers violative of Section 8(a)(1) and (3)?

4. Did the Board violate established principles of law by deciding questions 1 and 3 in a manner inconsistent with its otherwise uniform course of decision involving strikers' reinstatement rights?

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

### OPINIONS BELOW

The opinion of the Court of Appeals of which review is sought herein is unreported; it is reproduced in the Appendix to this Petition (hereafter "App.") at pp. 38a-42a, and will be referred to herein as *"United IV."*[1] That decision affirmed a supplemental decision of the National Labor Relations Board reported at 247 NLRB No. 174, 103 LRRM 1281, and reproduced at App. 17a-31a. That decision of the Board was issued on remand from an earlier decision of the Court of Appeals reported at 534 F.2d 422 (*"United II"*), which was reproduced in the Appendix to the Petition for Certiorari in No. 75-1686. The original decision of the National Labor Relations Board and of its Trial Examiner in this case are reported at 192 NLRB 382 and were also reproduced in

[1] The designations *"United I"* to *"United IV"* are those of the Court of Appeals, see App. 39a.

the Appendix to the Petition in No. 75-1686. A related decision of the district court (100 LRRM 2446), and of the Court of Appeals, 604 F.2d 4 (*"United III"*), are reproduced at App. 1a-10a, 11a-16a.

## JURISDICTION

The decision below was issued on July 10, 1981; a timely petition for rehearing and for rehearing en banc was denied on September 11, 1981. On December 3, 1981, Justice Marshall extended petitioners' time for filing a petition for certiorari to January 11, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTE INVOLVED

Sections 2(3), 7, 8(a)(1), 8(a)(3) and 13 of the National Labor Relations Act, 49 Stat. 449, 61 Stat. 136, 73 Stat. 519, 29 U.S.C. § 141 *et seq.* (hereafter "NLRA") or "the Act" are reprinted in pertinent part in the Appendix, *infra*, 46a-47a.

## STATEMENT OF THE CASE

### A. The Unfair Labor Practices at Issue in this Case.

This case involves the administration by United Aircraft Corporation[2] of strike settlement agreements (hereafter "SSA") or striker recall agreements (534 F.2d at 429, 432) between the Company and petitioner Unions following a 1960 strike. In the present posture of the case, the issue is whether the Company violated §§ 8(a)(1) and 8(a)(3) of the NLRA in two respects:

*First*, the Company promoted, transferred and demoted "active employees to vacancies in preference to reinstatement of [senior] strikers awaiting recall." (*Id.* at 432, 439-444). Both the district court in the related § 301 action (see pp. 4-12, *infra*), and the Second Circuit found

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[2] Now known as United Technologies Corporation. It will sometimes be referred to herein as "the Company" or "the employer". The case involves the Company's Pratt & Whitney and Hamilton Standard Divisions.

that "the Company's policy was to operate [during the SSA period] as if the unrecalled strikers had been laid off for lack of work." 534 F.2d at 439; 299 F. Supp. 877 at 896-897.[3] This policy was applied to 3,320 transfers, promotions and demotions during the SSA period.[4] "A significant number of these promotions and transfers were into jobs for which registered strikers were still awaiting recall, thereby foreclosing the striker's opportunity to fill that vacancy" (534 F.2d at 439).

*Second*, after the strike the Company returned to work "a significant number of non-strikers who nevertheless remained absent during the course of the strike * * * because of illness, fear of violence or other personal reason" (534 F.2d at 444-445); these "non-striker absentees" (*id.*) were thereby given preference over strikers awaiting recall and reinstatement.

Largely as a result of these Company policies, 1,562 strikers had not been recalled at the time of the expiration of the strike settlement agreements, and 1,600 were recalled during the life of the agreements to inferior jobs (A. 1456, 1458). 1,107 of the unrecalled strikers lost their jobs entirely, and 455 were returned to inferior jobs as new employees, without seniority[5] (534 F.2d at

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[3] The district court had found that: "[o]nly after the exhaustion of those sources [returned strikers, active employees and inactive absentees] did the preferred hiring list come into play in the defendant's administration of [SSA]." 299 F. Supp. at 914.

[4] There were involved a total of 2,415 transfers at the Pratt & Whitney Division (643 promotions, 699 demotions and 1,073 laterals) and 905 transfers at the Hamilton Standard Division (173 promotions, 199 demotions and 533 laterals) (A. 346-347). "A." refers to the Joint Appendix in the Court of Appeals in *United IV*.

[5] It was also alleged by the General Counsel of the Board, and by the Unions in the § 301 suit described in the text at pp. 4-9 that the Company had, in breach of the agreement, depressed the employee complement during the strike settlement agreement period in order to reduce the number of jobs available for strikers. It was further alleged in the unfair labor practice case that the

432). That the Company engaged in this conduct is not in dispute. The controversy between the parties is limited to the legality of that conduct. The Board, with the approval of the Court of Appeals, has ruled that the Company's conduct was lawful except with respect to transfers which adversely affected 72 strikers; one of the issues before this Court is whether there is any rational, legally tenable distinction between the Board's treatment of those 72 and its treatment of the 3,428 other strikers adversely affected by the Company's transfer policy.

**B. The Proceedings Below.**

**1. *The Court of Appeals' Decision in United II And the Underlying Labor Board and District Court Proceedings.***

In addition to filing unfair labor practice charges with the Board, the Unions filed suit under § 301 of the Act in the United States District Court for the District of Connecticut. The complaint alleged that the Company had breached the SSA by its administration thereof, including its transfer policies and its preference for the non-striker absentees. The district court proceedings are highly relevant to this Petition for this reason: In its original decision in the unfair labor practice case the Board adopted the conclusions which the district court

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Company had violated the Act by denying reinstatement to strikers after expiration of the strike settlement agreement and also that after expiration it had discriminated against strikers in determining whether or not to recall them on a basis forbidden by *Labor Board* v. *Mackay Co.*, 304 U.S. 333, 345-346 (1938). The Board, and the Court of Appeals in *United II* rejected all these contentions. With respect to the Company's failure to give preference to strikers with respect to jobs as they became available after expiration of the strike settlement agreement the Court ruled that such conduct was unlawful under *Labor Board* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1968) but that that decision would not be applied to the Company's conduct in 1961. The allegations described in this footnote were the subject of the Unions' Petitions for Certiorari in Nos. 75-1686 and 75-1729, which were denied at 429 U.S. 825 (1975).

had reached in its first opinion, and in its supplemental decision, on remand from the Court of Appeals, the Board adopted the same conclusions as those reached by the district court in its decision, which that court had issued on remand to it (100 LRRM 2446, affirmed in *United III*). The latter is one of the more bizarre features of this case, since, as will appear, the Board's supplemental decision was issued pursuant to a remand from the Court of Appeals which differed materially from the Court's remand to the district court.

The district court held that the policy of treating unrecalled strikers as if laid off was largely valid; the parties stipulated that, on its theory, only 72 unrecalled strikers were illegally affected (A. 198-205). The court also held that the Company's policy of reinstating non-striker absentees while strikers were awaiting recall was not a violation of the SSA. The Trial Examiner and the Board cryptically adopted the district court's construction of the SSA (see 534 F.2d at 456) and the Board, "to avoid duplication of remedies", also "adopted the identification of * * * discriminatees by the court." 192 NLRB at 385. The Court of Appeals decided in a single opinion (*United II*) the appeals of the Company and the Unions from the district court's judgment, as well as those parties' petitions for review (and the Board's cross-petition for enforcement) of the Board's original decision.

With respect to the Company's transfer practice, the Court of Appeals held that its policy of treating unrecalled strikers as if laid off violated the SSA, 534 F.2d at 439-441, because, *inter alia*, the "situation at the conclusion of the strike was fundamentally different from a layoff" (*id.* at 400). It held, nonetheless, that the "company was not required to recall a [senior] striker where to do so would result in the layoff of an active employee," holding this qualification to be consistent with *Labor Board* v. *Mackay Co.*, 304 U.S. 333 (1938) and *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963)

(534 F.2d at 442, n.35 and accompanying text). The Second Circuit concluded that:

> "where a promotion or transfer was made not to correct a production imbalance and the effect of the promotion or transfer was to deny recall to a striker or cause a striker to be recalled to a lower labor grade than he otherwise would have, the action constituted a breach of the Agreements because it denied an available job to a registered striker." (*Id.* at 442-443.)

The Court of Appeals perceived its difference with the district court as having very limited consequences as far as strikers other than the 72 were concerned. It reasoned that if the Company had not deliberately depressed the complement "in bad faith with the specific purpose of denying reinstatement to registered strikers, something the district court found that the Company did not do, it seems *unlikely* that it would demote or laterally transfer employees where they could be used in their present positions." 534 F.2d at 443 (emphasis added).[6] *On this supposition, the court limited the remand to the district court to the 72 found illegal promotions and certain transfers at Hamilton Standard,* 534 F.2d at 443-444.

In contrast with its affirmance of the Board's decision in dismissing other discrimination allegations, the court remanded the case to the Board "for further consideration of whether the actions of the Company ["with respect to promotions and transfers" (534 F. 2d at 456)], taken in carrying out the Strike Settlement Agreements

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[6] The court further assumed that, at Pratt and Whitney, even transfers and promotions for purposes not sanctioned by the SSA, if in the same occupational group and seniority area, "would not have had the effect of denying reinstatement to a registered striker, since they would necessarily have had the concomitant effect of opening up positions within the same occupational group and seniority area which the registered strikers could fill," *id.* at 443. On the premise that the Company had not depressed the complement in bad faith, the Court further assumed that registered strikers had been recalled to these positions (*id.*).

might have constituted unfair labor practices." (534 F.2d at 457-458.) Such further consideration was required for two reasons. First, "if the Board made an independent assessment of the Company's administration of the recall agreements there has been a total failure to articulate the basis of its conclusions." (*Id.* at 456).

Second, insofar as the Board may have relied on the presence or absence of a violation of the SSA, its conclusion could not survive the Second Circuit's disagreement with the district court (and thus the Board), as to the meaning of the SSA. (*Id.* at 457.)

The Court of Appeals directed the Board on remand to make an "independent legal assessment" of the Company's transfer, promotion and recall policies and their consequences, either without regard to the SSA, or by using the SSA as a "referent." (534 F.2d at 456-457.) If the Board chose to pin "findings of unfair labor practices (or absence thereof) * * * directly to the presence or absence of a Strike Settlement Agreement violation," the Board would be required to follow the court's "altered construction of the contract as in Part I of this opinion" (534 F.2d at 457)—

> "* * * that promotions and transfers of junior active employees violated the Agreements only when such transfer or promotion was not necessary to correct a production imbalance and avoid the layoff of an active employee."

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[7] "For example, why are transfers *across* seniority area lines which denied reinstatement to a striker (an 8(a)(3) violation according to the Board) any more likely to encourage or discourage membership in a labor organization than transfers *within* the same seniority area (not a violation of 8(a)(3)) which had the same effect? The same can be said for promotions and transfers of trainees (a violation) and apprentices (not a violation)." (emphasis in original; see also 457, n.60).

Moreover, the court declared that:

> "It was not sufficient for unfair labor practice purposes to say that certain conduct did not violate the Agreements, for the Board is by statute expressly empowered to override private arrangements.[59] 29 U.S.C. § 160(a) (1970); *see Lodge 743* v. *United Aircraft Corp.*, 337 F.2d 5, 8-9 (1964), *cert. denied*, 380 U.S. 908 (1965).

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[59] *Even if it is assumed that in 1960 the Company had no legal obligation to reinstate some of the strikers, such as those who had been permanently replaced, having undertaken to offer reinstatement, the Company could not discriminate against strikers in an unlawful manner.* To take an extreme hypothetical example, an employer plainly could not refuse reinstatement to the leaders of a lawful strike while offering reinstatement to those strikers who had been less active in their support." (*Id.*) (Emphasis added.)

To be sure, on the same speculative assumption that the Company would not have transferred or demoted junior active employees and inactive absentees in preference to senior unrecalled strikers unless the alternative were layoff, p. 6, *supra*, the court observed that "there has been no [wholesale] disregard of contractual terms and discrimination against strikers" (*id.* at 457), and that "the Board's unfair labor practice findings may well coincide with the breaches of the Agreement we have found" (*id.*). But the court made clear that on the remand the Board must consider the legality "of those promotions and transfer *policies* asserted by the Union in its petition for review to have been unfair labor practices and *not found by the Board to be such*" (*id.* at 456, emphasis added). Finally, the court made clear that the Board must on remand consider the Union's contention "that the reinstatement of all non-strikers absent during all or part of the strike violated the Act" and "state the reasons for whatever conclusion it reaches" with respect to the legality of that conduct. (*Id.* at 457, n.60.)

### 2. *The District Court's Decision on Remand and the Court of Appeals' Affirmance in United III.*

On the remand to it, the district court held that the Company had and failed to meet its burden of substantiating with tangible record proof its contention that transfers and promotions during the SSA period were made to avoid layoffs (App. 1a, 8a-10a). Upon review, the Court of Appeals acknowledged that it had not foreseen the question of "what proof would suffice to establish that United had, or had not, made these promotions for poststrike production adjustments" (604 F.2d 4 at 6); upheld the district court's finding that the burden of proof was on the Company; and agreed with the district court that, because the Company had failed to make records of the reasons for promotions, transfers or demotions during the SSA period, the Company could not meet this burden, *id.* at 617; App. 11a-16a.

### 3. *The Board's Decision on Remand.*

Although the Board accepted the remand (App. 20a, it did not in its Supplemental Decision pursue *either* of the alternatives left open by the Second Circuit, pp. 7-8, *supra*. The Board did not make an "independent legal assessment" of the Company's "promotions and transfer policies" based upon the NLRA, or upon the SSA as construed on appeal. Instead, the Board "reaffirm[ed] the finding in [the] original Decision and Order" (A. 157), that the Company had "adhere[d] to the terms of the SSA" and that its "overall administration of the [SSA] was lawful" (A. 318, 320, 157, 159). But *that* finding had been based on Judge Clarie's interpretation of the SSA, which the Second Circuit had *disapproved*, and upon the Second Circuit's speculative assumption in *United II*, which was thereafter repudiated in *United III*, *supra*.

The Board did not attempt to reconcile its aforesaid findings with the Second Circuit's conclusion that "promotions and transfers * * * into jobs for which regis-

tered strikers were still awaiting recall" (*United II*, 534 F.2d at 439), violated the SSA unless the Company proved its "production adjustment" defense (*United III*, 604 F.2d at 5). And the Board did not inquire whether any of the 3,248 transfers, promotions and demotions (other than the 72), were "necessary to correct a production imbalance and avoid the layoff of an active employee."

The Board also adopted the Second Circuit's holding in *United II*, 534 F.2d at 453-454, that the SSAs gave "strikers greater reinstatement rights than the rights ordinarily accorded strikers under then-existing and applicable labor law." The Board did not observe, however, that the court had used this rationale to justify limitation of strikers' recall rights to 4½ months; not to justify discriminatory preference of active employees and inactive absentees over senior unrecalled strikers during the 4½ month period during which strikers' "preferred employment status" (192 NLRB at 386), was preserved. The Board also concluded that "to the extent [the Company] complied with the terms of the SSA its conduct was lawful under the requirements of the National Labor Relations Act." (A. 158.) But the Board assumed that except in the 72 instances where victims were identified by the district court, application of the Company's policy "complied with the terms of the SSA", without recognizing that the district court's identification of victims of that illegal policy was cabined by the terms of the Circuit Court's remand to it, whereas the remand to the Board contained no such limitation. Thus the Board failed to determine, under the Court of Appeals' construction of the recall agreement, the impact of the Company's illegal administration of the SSS's on approximately 3,428 other unrecalled strikers.

4. ***The Court of Appeals' Affirmance of the Board (United IV).***

The Court of Appeals in *United IV* approved the Board's preclusion of the 3,248 promotions, transfers and

demotions on the ground that "the SSA accorded the strikers reinstatement rights equal to or greater than the rights governed by then-existing law"; therefore, "the only possible violations of the Act committed by the Company during the term of the SSA involved conduct in violation of the SSA," and the 3,428 other unrecalled strikers could not have been aggrieved by conduct in violation of the SSA because they had not been identified as victims of breach of the SSA by the district court on remand.[8] On the other hand, the court approved the Board's finding

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[8] In *United IV*, the court said that in *United II* the panel had authorized the Board "to adopt the findings [as to transfers, promotions and demotions] made by Judge Clarie in the remanded § 301 action" because the Board had "*previously* reviewed all the evidence" (emphasis added). But examination of the *United II* opinion, 534 F.2d at 455-458, shows that the court there *contrasted* the Board's adoption of the district court's findings on the depressed complement issue, because they were made after "independent examination *and appraisal* of the evidence" (emphasis added), with the Board's adoption of the district court's findings on the transfer issue. The court affirmed on the depressed complement issue but remanded the transfer issue, *inter alia*, because the Board had based its findings on Judge Clarie's *rejected* construction of the contract (534 F.2d at 457), and had totally failed "to articulate the bases for its conclusions":

> "we are at a loss to explain how the Board reached its conclusion that some transfers and promotions were unfair labor practices and others were not." 534 F.2d at 456.

The Board no more articulated an explanation in its opinion on remand than in its initial opinion. The Board simply again adopted the district court's "identification of discriminatees." App. 24a-25a, 28a-29a, 30a; 192 NLRB at 385. Moreover, the Board, which had followed the district court's construction of the SSA's, *could not* have "previously" considered any of the evidence pertaining to the 3,248 other transfers, because, on the district court's theory, *those transfers were privileged regardless of comparative seniority.*

In *United IV* the panel also said that the Board was directed in *United II only* to decide whether the SSA "itself was lawful and non-discriminatory within the meaning of the Act" and *not* whether the Company's *administration* of the SSA's was "lawful and non-discriminatory." However, the Board was explicitly directed to

> "that in 72 instances the Company denied reinstatement to registered strikers by improperly transferring or promoting existing employees over unrecalled registered strikers. These actions amounted to more than mere contractual violations; the 72 relevant transfers and promotions *impinged the legal reinstatement rights of those unrecalled strikers which had been incorporated in the SSA.* The actions had the effect of discriminating in favor of non-striking employees over unrecalled strikers." (App. 41a; emphasis added.)

The court did not explain why, if the 72 transfers, promotions and demotions "impinged the legal reinstatement rights of those unrecalled strikers which had been incorporated in the SSA," the same legal rights of other unrecalled strikers were not impinged by the 3,248 other blocking transfers, promotions and demotions.

## REASONS FOR GRANTING THE WRIT

In the course of this Petition we shall discuss five separate and distinct errors, the correction of any of which would require reversal of the judgment below, and each of which independently merits review under the criteria

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determine whether, *assuming that the SSA was lawful and nondiscriminatory* (534 F.2d at 457, n. 59 and accompanying text), *the Company had administered it in a discriminatory manner* by adopting and applying "those promotions and transfer policies *asserted by the Union in its petition for review to have been unfair labor practices and not found by the Board to be such.*" (Emphasis added, 534 F.2d at 456.) The court thereby necessarily referred to the "policies" resulting in the 3,248 other promotions, demotions and transfers, not the 72. The court emphasized this again by directing the Board to determine (534 F.2d at 457-458), "whether *the actions* of the Company *in carrying out* the Strike Settlement Agreements [during 1960] might have constituted unfair labor practices." (Emphasis added.) The court included among those actions transfers *within* seniority areas and occupational groups, as well as transfers *across* those lines (534 F.2d at 456, col. 2), and transfers of apprentices and inactive absentees (*id.*, and n.60, at 457), all of which had been excluded from the jurisdiction of the district court on remand.

set forth in Rule 17 of this Court. Before doing so, however, we would call the Court's attention to the enormity of the result which the Board has perpetrated, and which the Court of Appeals has condoned, notwithstanding its patent inconsistency with that court's own earlier decisions and mandate in this litigation, see n.8, pp. 11-12, *supra* and point V, *infra*. The 3,248 strikers who have been denied relief under the decision below (a greater number than the 1,122 victims of employer discrimination to whom the Board awarded relief in the entire fiscal year 1971)[9] have been treated differently in this respect than: 1) all strikers whose job rights were adversely affected by an employer policy of giving seniority preference to non-strikers over strikers;[10] 2) all strikers whose employee status was preserved by the action of an employer, even where the employer was privileged to terminate that status; and 3) all strikers, at least since *Labor Board* v. *Fleetwood Trailer Corp.*, 389 U.S. 375 (1968) which held that a striker retains his "employee" status under § 2(3) of the Act, and his right to preferential reinstatement, even where jobs are not available at the end of the strike. In each of these respects the decision below is contrary either to decisions of this Court or of the Board and the Courts of Appeals in other cases. Additionally, those strikers who were denied reinstatement by virtue of the Company's preference for the non-strikers were discriminated against in comparison with those non-strikers, contrary to a decision of this Court, and contrary to decisions of the Board and the Court of Appeals which we shall show are mutually inconsistent with each other, but which are both irreconcilable with the decision in this case. Finally, the remainder of the 3,248 strikers have been treated differently from the 72

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[9] *Thirty Sixth Annual Report of the National Labor Relations Board* (Gov't Print. Off. 1972) p. 18, Table 4.

[10] The single exception are the employees involved in *NLRB* v. *Potlatch Forests*, 189 F.2d 82 (9 Cir., 1951), disapproved in *Labor Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 222 (1963). See n.12, p. 16, *infra*.

strikers who were granted relief by the Board, with the approval of the Court of Appeals. There is no rational basis for this difference in result on the face of the judgment in this very case.

### I. The Board and the Court's Refusal to Effectuate the Statutory Rights of All Except 72 Unrecalled Strikers Conflicts With Decisions of this Court and Courts of Appeals Antedating *Fleetwood*.

The Board's failure on remand, approved by the court below, to find that the Company's policy of awarding superseniority by treating unrecalled strikers as if laid off, absent any proof of substantial and legitimate business justification, violated Section 8(a)(1) and (3) in all cases to which that policy was applied (not merely 72),[11] is in square conflict with decisions of this Court and courts of appeals antedating *Fleetwood*. *Olin Mathieson Chem. Corp.* v. *NLRB*, 232 F.2d 158 (4 Cir., 1956), *aff'd*

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[11] Under the mandate in *United II*, *supra*, pp. 6-8, 11-12, n.8, the Board was required to determine at this stage of the proceeding only whether United's superseniority policy, which was admittedly applied in every case of transfer, layoff and promotion, was justified by the avoidance of layoff consideration. Determination of the number and identity of unrecalled strikers adversely affected by application of this discriminatory policy is routinely reserved for the compliance stage of the proceedings. See, *e.g.*, *United Aircraft Corp.*, 192 NLRB at 385; *NLRB* v. *Duncan Foundry and Machine Works, Inc.*, 435 F.2d 612, 619, n.11 (7th Cir., 1970); *Superior Maintenance Company*, 133 NLRB 746, 747, n.2, 753 (1961); *Ironworkers Local 45*, 235 NLRB 211, 213, nn.8, 9 and accompanying text (1978).

The avoidance of "duplication of remedies" justification which led the Board in *United I* to "adopt * * * the identification of * * * discriminatees by the court" (192 NLRB at 385), disappeared after the remand when the Second Circuit, while reversing the district court's interpretation of the SSA, limited the scope of its remand to the district court, but did not so limit its remand to the Board, pp. 5, 6-8, *supra*. The Board was thereby authorized to grant relief to those unrecalled strikers whom the district court, because of the limitations in the mandate to it, could not find victims of breach of contract.

*per curiam*, 352 U.S. 1020 (1957); *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963); *NLRB* v. *Great Dane Trailers*, 388 U.S. 26 (1967); see also, *NLRB* v. *Wheeling Pipe Line*, 229 F.2d 391, 395 (8 Cir., 1956).

Well before 1960 this Court had held that strikers whose "employee" status at the end of the strike has not been terminated must be "treated *in all matters involving seniority and continuity of employment as though they had not been absent from work.*" *Olin Mathieson Chem. Corp.* v. *NLRB*, *supra*, 232 F.2d at 160 (4 Cir., 1956, *aff'd per curiam*, 352 U.S. 1020 (1957) (emphasis added); *General Electric Co.*, 80 NLRB 510, 512-513 (1948); *Quality Castings Co.*, 139 NLRB 928, 930-931, *rev'd on other grounds*, 325 F.2d 36, 43 (6 Cir. 1963); *Great Lakes Carbon Co.* v. *NLRB*, 360 F.2d 19, 21 (4 Cir., 1966) (superseniority granted after the 1959 strike to strikers who returned to work before its end discriminatorily affects "not only future layoffs * * * but also * * * open jobs").

In its Eighth Annual Report (Gov't Print. Off., 1944), pp. 32-33, the Board said, citing *Precision Castings Company, Inc.*, 48 NLRB 870 (1943):

> "The plea that strikers have lost their seniority merely by virtue of going on strike, and that their reinstatement or reemployment must therefore be subordinated to that of other employees who did not voluntarily participate in the strike, is merely another way of stating that the strikers are being discriminated against."

In *Giddings & Lewis, Inc.*, 255 NLRB No. 93, 106 LRRM 1391 (1981), the Board recognized that preference of junior inactive absentees and active employees over unrecalled senior strikers for placement in available jobs is "tantamount to ['superseniority'] * * * proscribed in *Erie Resistor*" [*Labor Board* v. *Erie Resistor Corp.*, *supra*]. In *Nelson Filter, A Division of Nelson Industries*, 255 NLRB No. 131, 107 LRRM 1090 (1981), it was acknowledged that "the Board *has long since held*

that the reinstatement right of an economic striker is a statutory right which transcends the existence of a union and a settlement agreement." (Emphasis added.)

The Board found and the Second Circuit agreed that, with respect to the 72, application of the Company's superseniority policy blocked recall of strikers who "had done no more than exercise their statutory right to engage in protected activity in support of the *Charging Parties*" (App. 29a, 41a). That policy was, therefore, "inherently discriminatory and destructive" of important employee rights which Sections 7 and 13 protect. *Labor Board* v. *Erie Resistor Corp., supra*, 373 U.S. at 228-230; *NLRB* v. *Great Dane Trailers, supra*, 388 U.S. at 33-35; *NLRB* v. *Duncan Foundry & Machine Works*, 435 F.2d 612, 620 (7 Cir., 1970).[12] The court below also held that the "legal reinstatement rights of *those* unrecalled strikers * * * had been incorporated in the SSA." (App. 41a, emphasis added.) However, neither the Board nor the court even purported to suggest that the same statutory reinstatement rights of the remaining unrecalled strikers had not been "incorporated in the SSA." If they were, application to those strikers of the superseniority policy *ipso facto* violated 8(a)(1) and (3), just as it did in the case of the 72. In this context, it is therefore irrelevant whether, as the Board and the court (erroneously to be sure) concluded, "the SSA accorded the strikers reinstatement rights equal to or greater than the rights governed by then-existing law" (App. 28a, 40a).

Since the Company's asserted "business exigenc[y]" justification (*Erie Resistor, supra*, 373 U.S. at 229-230,

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[12] *Erie Resistor*, like *Great Dane*, did not state new law. *NLRB* v. *Frick Company*, 397 F.2d 956, 963-964 (3 Cir., 1968). Rather, it confirmed the view which the Board had always taken, and "eliminated" (*NLRB* v. *Transport Company of Texas*, 438 F.2d 258, 266 (5th Cir., 1971)), the aberrational view of the Ninth Circuit (*NLRB* v. *Potlatch Forests*, 189 F2d 82, 86 (9 Cir., 1951)), which had already been discredited in *Olin, supra*, 232 F.2d at 161, aff'd 352 U.S. 1020. See also *NLRB* v. *Industrial Cotton Mills*, 208 F.2d 87, 91 (4 Cir., 1953).

n.8)—post-strike production adjustment—was found on remnad to be incapable of proof, p. 9, *supra*, the statutory violation is beyond dispute. Indeed, the Second Circuit itself appears to have recognized this in *United II*, 534 F.2d at 442 and n.35, by reconciling its "in lieu of layoff" exception with *NLRB* v. *Erie Resistor Corp.*, *supra*, thereby implicitly assuming that discriminatory superseniority, unless justified by legitimate business need, had been outlawed before 1960. *NLRB* v. *Olin Mathieson Chem. Corp.*, *supra*; *NLRB* v. *Wheeling Pipe Line*, *supra*, 229 F.2d at 395.

*Fleetwood* and *Laidlaw* (*The Laidlaw Corporation*, 171 NLRB 1366 (1968), enf'd, 414 F.2d 99 (7 Cir., 1969), *cert. denied*, 397 U.S. 920 (1970)), broadened the reinstatement rights of economic strikers in the sense that they immunized against employer termination the "employee" status of strikers "whose jobs were not available when the strike terminated, whether because they had been permanently replaced or because of production dislocations caused by the strike * * *." *United IV* quoting *United II*, 534 F.2d at 453. But *Fleetwood* and *Laidlaw* did not alter the law with respect to such vulnerable strikers whose "employee" status the employer elected not to terminate but to preserve, and whom the employer agreed to return to work as vacancies occurred.

Even on the law as it stood in 1960 (assuming that is relevant, but see pp. 23-24 *infra*), unavailability of work at the time a striker applied for reinstatement, like strike misconduct, constituted grounds for termination of the "striker's employment relationship"; it did not "automatically terminate" that relationship. *Union Twist Drill Co.*, 124 NLRB 1143, 1145 (1959); *NLRB* v. *Wallick*, 198 F.2d 477, 484 (3 Cir. 1952); *NLRB* v. *Crimptex, Inc.*, 517 F.2d 501, 504 (1 Cir., 1975). By analogy to the condonation doctrine, if the struck employer elected to preserve or restore, rather than terminate, a vulnerable employment relationship with such strikers, their vulnerability to termina-

tion ended and statutory reinstatement rights vested in them by operation of law.[13] *Stewart Die Casting Corp.* v. *NLRB*, 114 F.2d 849, 855-856 (7 Cir., 1940), *cert. denied*, 312 U.S. 680 (1941); *NLRB* v. *E. A. Laboratories, Inc.*, 188 F.2d 885, 887 (2 Cir., 1951), *cert. denied*, 342 U.S. 871 (1951).[14] Those rights did not await and were not dependent upon availability of work or the strikers' actual return to work. They arose from the employer's undertaking. As the Second Circuit itself put it in *NLRB* v. *Roure-DuPont Mfg. Co.*, 199 F.2d 631, 633 (2 Cir., 1952):

> "Respondent was under no obligation to rehire strikers who had been permanently replaced or whose jobs had been abolished during the strike. N.L.R.B. v. Mackay Radio & Telegraph Co., 304 U.S. 333 * * *; Kansas Milling Co. v. N.L.R.B., 10 Cir., 185 F.2d 413. But when an employer promises to rehire striking employees as soon as their positions again become available, he may not discriminatorily violate this undertaking. Wilson & Co. v. N.L.R.B., 7 Cir., 124 F.2d 845; see also our decision in N.L.R.B. v. E.A. Laboratories, 2 Cir., 188 F.2d 885, certiorari denied E.A. Laboratories v. N.L.R.B., 342 U.S. 871."

Accord: *United II*, 534 F.2d at 457, n.59. Those were the statutory "reinstatement rights which had been incorporated in the SSA." (App. 41a).

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[13] *United II* decided (contrary to our view with respect to *Fleetwood*) that the employer could agree to preserve employee status and reinstatement rights for a limited period of 4½ months only, and that at the expiration of that period the employer could lawfully terminate unrecalled strikers' status (534 F.2d at 449-454). *Fleetwood* and *Laidlaw* changed the law in this respect, by holding unrecalled strikers' "employee" status invulnerable to termination by the employer at any time. *Brooks Research & Mfg., Inc.*, 202 NLRB 634 (1973).

[14] In *Beverage-Air Company*, 164 NLRB 1127, 1156, n.89 and accompanying text (1967), the Board followed and relied on *Stewart Die Casting Corporation* v. *NLRB*, *supra*, in holding it to be the employer's duty *to reinstate an economic striker whose employee status the employer had elected to preserve and not terminate "at the time of the strike settlement."* (Emphasis added).

The Second Circuit having found in *United II* that the superseniority policy violated the SSA unless the alternative was layoff of the transferred junior active employee, the Board and the court on review were required to determine whether the employer proved that defense in the case of all transfers, promotions and demotions, not merely the 72.

**II. Refusal to Find the Other 3,248 Applications of the Superseniority Policy Violative of Section 8(a)(1) and (3) Flouts Basic Due Process and Equal Protection Guarantees.**

By treating differently the 72 applications of the employer's superseniority policy which it found violative of the Act and the 3,248 other applications of that policy which it disregarded, the Board flouted equal protection and due process principles in administrative law. As stated in *Local 777, Democratic U. Organizing Com.* v. *NLRB*, 603 F.2d 862, 872 (D.C. Cir., 1978):

> "The Board cannot, despite its broad discretion, arbitrarily treat similar situations dissimilarly, *e.g.*, *Carnation Company* v. *NLRB*, 429 F.2d 1130 (9th Cir., 1970); *Burlington Truck Lines* v. *United States*, 371 U.S. 156 * * * (1962); *NLRB* v. *WGOK, Inc.*, 384 F.2d 500 (5th Cir., 1967); *Burinskas* v. *NLRB*, 123 U.S. App. D.C. 143, 357 F.2d 822 (1966). When it both fails to distinguish contradictory decisions rendered in similar cases and also misapplies accepted principles of law, it errs doubly, *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 443 * * * (1965). An agency in its deliberations is under an obligation to follow, distinguish, or overrule its own precedent, *Brown* v. *NLRB*, 462 F.2d 699 (9th Cir.) *cert. denied*, 409 U.S. 1008 * * * (1972); *May Department Stores Co.* v. *NLRB*, 454 F.2d 148 (9th Cir.), *cert. denied*, 409 U.S. 888 * * * (1972); *Carnation Co.* v. *NLRB*, *supra*."

If the Board is required to be consistent in its treatment of *different* cases, *a fortiori*, is it required to be

consistent in its treatment of identical situations in the *same* case. Not only did the Board make no effort to distinguish the 72 from the 3,248, but it advanced no explanation for again adopting the district court's "identification of discriminatees," despite the fact that the district court's authority was limited by the terms of the remand to it even after the proceedings on remand had established that the "series of factual assumptions" (*Habib* v. *Raytheon Co.*, 616 F.2d 1204, 1209-1210, n.7 and accompanying text (D.C. Cir., 1980)), upon which those limitations were predicated were erroneous.[15]

Whether or not the Second Circuit's mandate in *United II* can reasonably be read as authorizing the Board on remand to adopt the district court's identification of discriminatees on remand (pp. 10, 11-12, n.8, *supra*), the violation of due process and equal protection remains, for the district court's identification was cabined by limitations in the mandate to it which, in turn, were based upon assumptions of fact by the Court of Appeals in *United II* which *United III* disproved. Disproven factual assumptions or speculations cannot support differences in treatment either for due process or equal protection purposes.

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[15] As noted in *Briggs* v. *Pennsylvania R.R. Co.*, 334 U.S. 304, 306 (1948), from

> "its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court. * * * The rule of these cases has been uniformly followed in later days * * *." [Citations omitted.]

As stated in *Gulf Coast B. & S. Co.* v. *International Bro. of E.W., No. 480*, 460 F.2d 105, 107 (5th Cir., 1972):

> "The usual rule is that '[A] mandate is completely controlling as to all matters within its compass, but on remand the trial court is free to pass upon any issue which was not expressly or impliedly disposed of on appeal.'"

*In re Sanford Fork & Tool Co.*, 160 U.S. 247 (1895), contrasted in *In re Potts & Co.*, 166 U.S. 263 (1897), followed in *Zdanok* v. *Glidden Company, Durkee Famous Foods Division*, 327 F.2d 944, 950 (2 Cir., 1964), *cert. denied*, 377 U.S. 934.

### III. The Court of Appeals' Nonretroactivity Theory Conflicts With the Decisions of This Court and Other Courts of Appeals.

The Board and the Court of Appeals decided this case on the basis that the strike settlement agreements gave the strikers greater rights than they would have had under the law as it existed in 1960. We have shown in the preceding section that because the employer, in settling the strike, preserved the status of strikers as employees it is irrelevant whether they retained that status by virtue of the statute. But the assumption below that the strikers' rights are to be determined on the basis that they did not retain that status under the statute itself raises a grave question as to which we submit the decision below is inconsistent with decisions of this Court and of the Courts of Appeals under circumstances which are indistinguishable in principle. For this Court held in *Fleetwood* that a striker retains his status as an employee, and the right to any job that opens up which he is qualified to fill, whether or not there are any jobs available at the time the strike is over. In so ruling, this Court did not overrule any of its prior decisions, but merely construed the Act on an issue not previously presented to it. In *United II* the Court of Appeals held that *Fleetwood* would not be applied "retroactively"; but it did so in the context of ruling that the Company was entitled to treat as new applicants for employment strikers who had not been reinstated before SSA expired. As previously noted, this Court denied certiorari on this issue in No. 75-1686. That order is, of course, not a decision on the merits, and indeed would be open for reconsideration if, in the course of these same proceedings, the issue were to arise in its original context. Cf. *Hughes Tool Co.* v. *Trans World Airlines*, 409 U.S. 363, 365-366, n.1 (1973). But in *United IV* the Court extended its "nonretroactivity" theory to immunize the Company's discriminatory transfer policy, a step not even intimated in *United II*, and for which there was *no* supporting authority in 1960, p. 16, n.12, p. 18, n.13, *supra*.

Heretofore, a private party has been exonerated on retroactivity grounds, if at all, only where:

> "there was a clearly declared judicial doctrine upon which [the alleged violator] relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful." *Hanover Shoe* v. *United Shoe Mach.*, 392 U.S. 481, 496 (1968).

The Court of Appeals' nonretroactivity theory is also squarely inconsistent with the teaching of *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975). This Court expressly held that "it is not a sufficient reason for denying back pay" that Albemarle's breach "had not been in 'bad faith'" (422 U.S. at 422), explaining (*id.*):

> "If backpay were awardable only upon a showing of bad faith, the remedy would become a punishment for moral turpitude, rather than a compensation for workers' injuries. This would read the 'make whole' purpose right out of Title VII for a worker's injury is no less real simply because his employer did not inflict it in 'bad faith.'"

In a footnote to this passage the Court pointed out the parallel between the backpay remedy under Title VII of the Civil Rights Act and that under the National Labor Relations Act.

Additionally, there is a particularly striking conflict between the decision below and that of the Third Circuit on remand in *Erie Resistor* itself. In *International U. of E., R., & M. Wkrs., Local 613* v. *NLRB*, 328 F.2d 723, 727 (3 Cir., 1964), the Court said:

> "The Company contends that it would be inequitable to enforce the affirmative directives under the facts and circumstances of this case. It is argued that the representatives of the Company acted in good faith in the honest belief that they had a right to adopt the job assurance plan to protect replacements. We are of the view that good faith, based

upon an erroneous interpretation of the law, is not available as a defense. [Citations omitted]. An employer who pursues a course of conduct later determined to be an unfair labor practice does so at his peril." [16]

**IV. The Holding That Superseniority for Non-Striker Absentees and Apprentices Does Not Violate the Act Is In Conflict With *Erie Resistor*.**

The Second Circuit's holding in *United II*, that preference of non-striker absentees over senior unrecalled strikers is not invalidated by *Erie Resistor* (534 F.2d at 444-445), was likewise (as in the case of "active" employees) based on the assumption that the alternative to preference was layoff for lack of work. "These individuals did not voluntarily encounter a risk of loss of their jobs" (*id.* at 445). In its Supplemental Decision, the Board again adopted this explanation (App. 29a-30a), despite the fact that the job loss assumption had been tried and found wanting in *United III* by both the district court and the Second Circuit. The court below did not even mention this issue in *United IV*.

In this respect also the decision of the Board and the court below are in square conflict with historic discrimination law. Except in this case, it has never been de-

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[16] The single case which the Court in *United II* purported to follow (534 F.2d at 452-453) approves as controlling the distinction "between [retroactive clarification of *uncertain law*] and retroactive *changes in clear law* that has been specifically relied upon * * *." *Retail, Wholesale and Department Store Union (RWDSU)* v. *NLRB*, 466 F.2d 380, 391, n.26 (D.C. Cir., 1972) (emphasis added), quoting Davis, *Administrative Law*, § 17.08 (1970 Supp.). In *RWDSU* the court explained *denial* of retroactive effect to an overruling decision (*Laidlaw*) as resting on (*id.*, at 392) "* * * the principles which underlie the very notion of an ordered society, in which authoritatively established rules of conduct may fairly be relied upon." The principles of an ordered society require no less that, short of overruling ineluctibly applicable "well established and long accepted" law (*id.* at 391), the risk of legal uncertainty be borne by the actor who turns out to be wrong.

cleared that a person who does not work during a strike for a reason other than the strike occupies a position which thereby becomes unavailable to a senior striker. On the contrary, the Board's consistent position has been that the reason for an individual's absence during the strike is irrelevant in determining his reinstatement rights. See *Congoleum Industries, Inc.*, 197 NLRB 534, n.1 (1972) and cases cited in the Trial Examiner's decision therein, *id.* at 547, n.62-65.[17] And a preference for those whose absence was due to reasons unrelated to the strike is, *a fortiori, contra* to the Act if such absence "is not protected activity" as the Fourth Circuit held in *NLRB* v. *Union Carbide Corp.*, 440 F.2d 54, 56 (4 Cir., 1971), *cert. denied*, 404 U.S. 826. See *Precision Castings Company, Inc.*, 48 NLRB, 870, 878-880 (1943); see also the Board's Eighth Annual Report quoted p. 15, *supra*, and *Labor Board* v. *Mackay Radio, supra.*

Similarly, the Board and the court's *sub silentio* holding in *United IV* that preference of apprentices over senior unrecalled journeymen strikers did not violate the Act (cf. *United II*, 534 F.2d at 444), is not only invalidated by the demise of the "job loss" defense in *United III*, it is in conflict with *J. I. Case Company* v. *NLRB*, 321 U.S. 332 (1944), which holds that individual contracts are subordinate to statutory rights and collectively bargained agreements. Even if there had been formal individual agreements which gave apprentices preference over unrecalled journeymen strikers in post-strike competition for open jobs (and, of course, there were none), such agreements would not have constituted a "legitimate business reason" for favoring non-striker apprentices over journeymen strikers.

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[17] The Board's approach is consistent with the general principle that employees' statutory rights are not to be determined on the basis of their subjective motivations. *See NLRB* v. *Weingarten, Inc.*, 420 U.S. 251, 257-258, n.5 (1975); citing, *inter alia, Congoleum, supra.*

**V. In Affirming the Board's Order, The Court Of Appeals Departed From the Accepted Course of Judicial Review of Administrative Agency Action.**

Sanctioning as compliance with its mandate in *United II* (p. 12, *supra*), the Board's readoption of the district court's "identification of discriminatees," which arbitrarily deprives 3,428 identically situated unrecalled strikers of the Act's protection, so far departs from the accepted and usual course of judicial proceedings as to call for exercise of this Court's power of supervision. This Court is, of course, not "foreclosed from determining * * * for itself" (*FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 379 (1965), whether the Court of Appeals' interpretation of its *United II* mandate in *United IV* is correct (*id.*). Certiorari should be granted to decide whether the different *United IV* panel jettisoned the mandate in *United II* because here, as in *Colgate* and *Federal Communications Com'n* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 141 (1940), a much deeper issue is involved.

Under *Olin Mathieson* and *Erie Resistor*, *supra*, proof of a legitimate and substantial business justification is the *sine qua non* of validation of a discriminatory superseniority policy, as the Second Circuit itself recognized in *United II*. The Court's approval in *United IV* of the Board's rejection of the claims of 3,428 victims of United's discriminatory superseniority policy, in the face of the finding in *United III* that the Company did not have the legitimate and substantial business justification it claimed, is so shocking a departure from the usual course of judicial proceedings as to warrant the exercise of this Court's supervisory power.

## CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

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# APPENDIX

U.S. DISTRICT COURT
DISTRICT OF CONNECTICUT

Nos. 9084 and 9085

LODGE 734, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

v.

UNITED AIRCRAFT CORPORATION, LODGE 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

v.

Same

December 13, 1978

On remand from the U.S. Court of Appeals for the Second Circuit (90 LRRM 2272, 534 F.2d 422). Judgment in accordance with opinion.

See also 70 LRRM 2972, 299 F.Supp. 877; 79 LRRM 2095, 336 F.Supp. 811; and 93 LRRM 2362, 429 U.S. 825.

Mozart G. Ratner, Washington, D.C., for plaintiff.

Joseph C. Wells, Washington, D.C., for defendant.

*Full Text of Opinion*

CLARIE, Chief Judge:—In this action, the unions had alleged certain breaches of the Strike Settlement Agreements, which had been entered into by the parties to settle a labor dispute in 1960. A Memorandum of Decision reported in 299 F.Supp. 877, 70 LRRM 2972, was filed on March 29, 1969, and a supplemental ruling on the issue of prejudgment interest was reported in 336 F.Supp. 811, 79 LRRM 2095 (1971). A final judgment was entered on June 27, 1972. Cross-appeals were taken to the Second Circuit Court of Appeals, where the Dis-

trict Court's judgment was affirmed in part and remanded, 534 F.2d 422, 90 LRRM 2272 (2d Cir. 1975), cert. denied 429 U.S. 825, 93 LRRM 2362 (1976). The issues remaining to be decided on this remand are: (1) whether certain transfers at the Hamilton Standard Division and transfers and promotions at the Pratt & Whitney Aircraft Division violated the Strike Settlement Agreements, and (2) whether the awarding of prejudgment interest retroactive to the date of filing the court's decision was an appropriate disposition in this case.

The appellate court stated with respect to the latter issue that:

> "Because the district court here did not approach the issue of prejudgment interest as a matter within its sound discretion, we are constrained to remand the question for reconsideration in light of this opinion. The district court applied the rule that prejudgment interest is not recoverable on an unliquidated sum that is incapable of ascertainment. See, e. g., Williston on Contracts § 1413 (3d ed. 1968). Since the extent of the Company's liability for breach of contract, if any, was not known until the filing of the opinion on March 20, 1969, the court ruled that interest was collectible commencing on this date. But the rule applied by the district court is certainly not a rigid one, precluding altogether the award of such interest. In re Paramount Publix Corp., 85 F.2d 42, 45 (2d Cir. 1936). Rather the fact that the sum on which interest was to be awarded remained unliquidated until March 1969 was itself reason for the district court to exercise its discretion. See Norte & Co. v. Huffines, supra, 416 F.2d at 1191; Restatement of Contracts § 337(b).
>
> "The district court seems also to have based its decision not to grant prejudgment interest from the dates of breach on the Company's good faith and in-

nocence from 'unlawful, wrongful, and vexatious conduct.' 336 F.Supp. at 813-14, citing United Protective Workers v. Ford Motor Co., 223 F.2d 49, 53, 54, 36 LRRM 2163 (7th Cir. 1955). However, awards of prejudgment interest are essentially compensatory, Norte & Co. v. Huffines, supra, 416 F.2d at 1189-91, and wrongdoing by a defendant is not a prerequisite to an award.

"The district court may wish to take into account the foregoing considerations, and therefore we remand the question of allowable interest *for such consideration as the district court may deem appropriate.*" (Emphasis added). 534 F.2d at 447, 90 LRRM at 2291.

The trial court has carefully reviewed the appellate court's opinion and has given special attention to its observations that:

"In suits for breaches of labor agreements, as in other areas, a vital ingredient in the determination whether to award prejudgment interest is a desire to make whole the party injured by the breach, but in appropriate circumstances, compensatory principles 'must be tempered by an assessment of the equities.' " Id. at 447, 90 LRRM at 2290.

The Court having considered and assessed the equities in this case and having applied its sound discretion, hereby adopts and reiterates its conclusion, as is more specifically set out in its original Memorandum of Decision, and finds that prejudgment interest should be awarded to the plaintiffs commencing March 20, 1969.

The second issue to be considered by the Court under the remand order concerns the transfer and promotion of "on the job employees' at Hamilton Standard and Pratt & Whitney during the administering of the Strike Settlement Agreements, commencing August 8 and 9, 1960, respectively, up through December 31, 1960. As

noted in this Court's opinion, the defendant employers claimed that:

> "[D]uring the 'settlement period,' [they were] entitled without qualification to transfer, promote or demote an active employee from the job he was performing to another job, provided it was within the same occupational code and seniority area; and this was true even though there were more senior employees on the preferred hiring lists who could have performed the job (and at Hamilton had the demonstrated ability to perform the job) to which the junior employee was transferred, or demoted." 299 F.Supp. at 913, 70 LRRM at 2999.

The Circuit Court, in evaluating this argument, directed the trial court in the remand order, as follows:

> "Summarizing our holding with respect to the issue of promotions and transfers of junior active employees, we find that lateral transfers, demotions, and promotions made for the purpose of correcting production imbalances and avoiding layoffs where work in a particular area ceased to be available did not constitute breaches of the Strike Settlement Agreements. Personnel adjustments made for other reasons that had the effect of blocking reinstatement altogether or causing a striker's reinstatement to a lower position, on the other hand, did violate the Agreement. We have determined that no transfer or demotion made at Pratt & Whitney would have had the effect of depriving a registered striker of reinstatement, and therefore, the district court on remand need not consider transfers and promotions [demotions?] at Pratt & Whitney. At Hamilton Standard, however, we cannot say to a certainty that no blocking transfers were made for purposes other than to correct a production imbalance, and therefore it is open on remand for the Union to show that such transfers did occur and that they deprived a registered striker of reinstatement.

> "With regard to the 45 promotions found by the district court to have breached the Agreement, the district court should inquire into the reasons for these promotions. If they were made simply as a matter of personnel policy and not as a production adjustment, then the promotions were indeed breaches of the Agreements, as the district court found. If, on the other hand, the promotions were necessary production adjustments caused by post-strike production conditions, these promotions did not violate the Agreements." 534 F.2d at 444, 90 LRRM at 2288-89.

In a nutshell, then, the remand order directed a reconsideration of the reasons for both transfers and promotions at Hamilton Standard and promotions at Pratt & Whitney. However, because both counsel have agreed, after a review of the facts, that there was no violation of the Strike Settlement Agreements in the "transfer" category at Hamilton, the only issues remaining are the promotions at both plants.[1]

## Discussion

The defendant employers' posture in this case on remand has been that if they did not expand the job complement after the promotion or replace the actual person who was promoted, that fact in and of itself is sufficient for this Court to infer that the reason for the promotion was that the employer was compelled to promote that employee or in the alternative to lay him off for lack of work, because they were overstaffed. There was no convincing record proof offered at the trial, that these promotions were made to deal solely with imbal-

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[1] Counsel have also agreed that the claim made in Exhibit 4 is moot, inasmuch as the striker Guerra #118256, Seniority Code #1487 suffered no monetary or other damage by the promotion of Greene #94869, Seniority Code #1807.

ances in production, in order to keep active employees at work. On this issue this Court found in its original opinion:

> "The remaining 26 promotees were promotions from one job to another in the same seniority area. While the defendant claims this latter group simply reflects normal advancement of employees at work, several indicate the jumping of one or more labor grades. When these promotions were made, there were 121 registered strikers awaiting recall into these positions (DX-78), some of whom enjoyed greater seniority than the promotees. The identity of the specific registered strikers affected and the actual damages, if any, to which each such person may prove he is entitled, shall be reserved until the hearing in damages." 229 F. Supp. at 919.

Even if the number of employees in a particular job code or occupational code were not increased by the end of the strike settlement period, December 31, 1960, absent properly documented change of status or put-on slips, the number of employees in other job and occupational codes could well have been increased to the detriment of qualified senior employees on the reemployment list. That this did happen on several occasions is confirmed in part by the defendant's stipulation, that in certain specific instances, strikers awaiting recall were in fact prejudiced by the promotion of active employees who had less seniority.

In Exhibit 1, the defendant concedes that the promotion of Butler #32517, Seniority Code #1504, on August 22, 1960 from Grade 5 to Grade 4, prejudiced striker Shaw #44021, Seniority Code #929. Similarly, in the same exhibit, defense counsel conceded that the promotion of Sullivan #117801, Seniority Code #1629, on August 22, 1960 from a Grade 5 to Grade 4, prejudiced striker Hammond #12707, Seniority Code #1365

and that there was no reasonable explanation for the promotion.

In Exhibit 2 defense counsel concedes that employee Vaillancourt #33534, Seniority Code #928, was disadvantaged by the promotion of Marino #46951, Seniority Code #1852. In Exhibit 3 defendant's counsel concedes that Arsenault #116566, Seniority Code #1478, was disadvantaged by the promotion of Deveau #146679, Seniority Code #807.

In Exhibit 5, counsel for the defendant conceded that employee Huntley #23485, Senority Code #1153, was disadvantaged by the promotion of Chamberlain #104139, Seniority Code #1460. In Exhibit 11, defense counsel conceded that employee Messier #34990 (seniority date October 23, 1956) was disadvantaged by the promotion of Dittman #37632 (seniority date August 18, 1959) from Labor Grade 8 to Labor Grade 6.

On the other hand, in Exhibit 6 there is disclosed the promotion of eight employees from a Surface Grinder, Labor Grade 9 to a Grinder Blades and Vanes Job, Grade 8; and contemporaneously moving people from two other jobs into the jobs from which the promotions were made. The defendant employers argue, that if they had brought back eight strikers from the reemployment list, who were admittedly more senior to the promotees and put them into this Grade 8 job, instead of moving these active people by promotion, they would have had no work for the active employees and would have been required to lay them off. (Tr. 4338-4339; Tr. 6269-6270).

However, with respect to these contested cases, counsel for the defendant openly conceded that there exists no tangible or testimonial evidence presently available to support the employers' present contention, that these promotions were made because of production adjustment. Defendant's counsel admitted in his argument, . . . it

would boggle anyone's mind to try to find the supervisor who was there 18 years ago, and ask him what the situation was on September 9, 1960." The only existing records which could have contained the reasons for the promotions are the change of status slips. (Tr. 3555). However, the defendant employers did not record on those change of status slips, the reasons which they would now claim as the basis for the challenged promotions; nor did they keep any other personnel records explaing why these promotions were necessary and why senior strikers awaiting employment were not hired, pursuant to the Strike Settlement Agreements, as vacancies became available.

It should also be noted in passing, that under the terms of the labor contracts an employee could be performing virtually all the duties of a higher-rated job for 90 consecutive working days—not just calendar days—as a probationary employee, until he became entitled to a permanent promotion to the higher grade.[2] Thus in situations where a promotion has been challenged here, a temporay probationary transfer could have been utilized as the employers were building back to normal production, and this procedure would have fully respected the Strike Settlement Agreements, which were limited by their terms to end on December 31, 1960. Another technique commonly used at the time, was to loan out surplus employees to meet peak load conditions, where delayed production in certain other departments caused overstaffing. (Tr. 3569).

The plaintiff-unions have made out a prima facie case of a violation of the Strike Settlement Agreements by establishing that junior active employees were promoted, at a time when there were senior strikers awaiting reemployment. If the employers had wished to claim that

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[2] Article VII § 7 Labor Agreement, Pratt & Whitney Division; Article VII § 6 Labor Agreement. Hamilton Standard Division.

"production needs" dictated these promotions, then it was their burden to substantiate their claims with tangible record proof. The companies concede that they neglected to record on the change of status slips or any other personnel records which were completely under their control, any justification for the promotions used to fill these vacancies. Having offered no persuasive tangible evidence to support their present contention, that these promotions were necessary to prevent the layoff of active employees, who would otherwise have become surplus, the defendant has failed to meet its burden of proof.

> "[O]nce it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him." NLRB v. Great Dane Trailers, 388 U.S. 26, 34, 65 LRRM 2465 (1967).

Also see, 299 F.Supp. 877, 891, 70 LRRM 2972 (1969).

The Court therefore refuses to draw the inference, which the defendant has requested the Court to do; namely, that the fact that the number of employees on December 31, 1960 in a particular job code and occupational group had not increased, demonstrates that the employers' action was attributable to production imbalances and production needs, and that any hiring from the registered strikers' reemployment list under such circumstances would have necessitated the layoff of active personnel, which the companies were not legally required to do. In evaluating the overall situation, one must be ever mindful of the fact that both employers were striving at that time to build back into full production, as rapidly as the circumstances would permit.

The Court finds that the challenged promotions in question were primarily attributable to the defendant's

normal personnel policies and were not attributable to an imbalance in production; as so carried out, this conduct violated the Strike Settlement Agreements. Under the personnel policies followed, the defendants did not bring the preferred hiring list into play, until all available active qualified promotees were exhausted. The plaintiffs' motion to confirm judgment regarding the promotions on remand is granted.

SO ORDERED.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 826, Docket 79-7034

LODGE 743, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Plaintiff-Appellee,*
v.
UNITED AIRCRAFT CORPORATION,
*Defendant-Appellant*
(*two cases*).

Argued March 28, 1979

Decided July 26, 1979

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Mozart G. Ratner, Washington, D.C. (Plato E. Papps, Washington, D.C., of counsel), for plaintiffs-appellees, Lodges 743 and 1746.

Joseph C. Wells, Washington, D.C., for defendant-appellant, United Aircraft Corp.

Before MOORE, FRIENDLY and MESKILL, Circuit Judges.

MOORE, Circuit Judge:

In the summer of 1960, Lodges 743 and 1746 of the International Association of Machinists & Aerospace Workers (the "Union"), conducted a strike at various plants of United Aircraft Corporation ("United") in its Hamilton Standard Division and its Pratt & Whitney Aircraft Division. The strike was finally settled and written agreements were entered into, which will be referred to as the Strike Settlement Agreements. The only phase of the Agreements here involved is that

relating to the procedure, and the circumstances, under which certain strikers would be recalled to jobs.

The Agreements provided for recalling the strikers in three phases. Under Phase 1, strikers would be returned to their pre-strike jobs (*i.e.*, same job code, department and shift) if the jobs were available at the end of the strike. If a striker's prestrike job was not available, under Phase 2 he would then be recalled to certain other jobs then available. Finally, under Phase 3 registered strikers not recalled up to that point would be put on a preferred hiring list and placed in jobs which developed before December 31, 1960, the expiration date of the Agreements, before new employees were hired. Despite careful draftsmanship, as not to infrequently happens, a controversy arose as to the practical application of the recall provisions. The Union brought suit against United, which resulted in a lengthy trial. The facts as found and the conclusions of law therefrom are set forth in the district court's opinion of March 20, 1969, 299 F.Supp. 877, 879-936 (D.C.Conn. 1969).

In addition to the Union's suit against United, the Union filed unfair labor charges with the National Labor Relations Board ("NLRB") involving virtually the same recall disputes. The Trial Examiner's ruling was with minor exceptions similar to that of the district court. The appeals by United and the Union from the district court's judgment and by the NLRB for enforcement and by the Union for review of the Board's decision were argued together and were dealt with in this court's opinion reported at 534 F.2d 422 (2d Cir. 1975).

We affirmed almost all of the district court's conclusions but remanded the case for further proceedings regarding the transfer and promotion of junior active employees and the award of prejudgment interest.[1] The

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[1] Judge Clarie affirmed his previous award of pre-judgment interest from March 20, 1969.

latter issue is not involved in the present appeal. As to the NLRB petition, we enforced the Board's order in part and remanded the case to the Board for further proceedings.

The proceedings on remand to the trial court took the form of the Union's Motion to Confirm Judgment Regarding Promotions on Remand, a Stipulation of Facts, and a hearing on the motion on March 3, 1978. Chief Judge Clarie's opinion granting the motion was filed on December 13, 1978, and this appeal followed. Thus, after almost 20 years the case, practically equalling in time the sleep of Rip Van Winkle, comes before us for a hopefully final decision.

The issue before us on this appeal was succinctly slated by the trial judge as follows:

> "(1) whether transfers at the Hamilton Standard Division and transfers and promotions at the Pratt & Whitney Aircraft Division violated the Strike Settlement Agreements. . . ."

Because the parties agreed, upon reviewing the facts after we remanded the case, that no violations of the Agreements occurred in the transfers category, the trial judge had to rule only on the propriety of 45 promotions in both divisions of United. As to these 45 promotions, we had not realized in 1975 that in large industrial plants the passage of 15 years is tantamount to a period of time beyond which "the memory of man runneth not to the contrary" when we said:

> "With regard to the 45 promotions found by the district court to have breached the Agreement, the district court should inquire into the reasons for these promotions. If they were made simply as a matter of personnel policy and not as a production adjustment, then the promotions were indeed breaches of the Agreement, as the district court found. If on the other hand, the promotions were necessary pro-

> duction adjustments caused by post-strike production conditions, these promotions did not violate the Agreements." 534 F.2d at 444.

But what we did not explain was what proof would suffice to establish that United had, or had not, made these promotions for post-strike production adjustments.

The district court envisioned the problem quite correctly saying: "[I]sn't it incumbent upon this Court now to make a finding as to each of these individuals". The court and counsel attempted to complete this program. As to several of the individuals involved, United conceded that the promotions had disadvantaged senior, unrecalled strikers. Thus, the court's ultimate findings applied to a group of 38 strikers who had not been recalled.

The facts with respect to this group of 38 fall into the following general pattern. United promoted active employees into vacant positions which a senior striker could have filled and left unfilled the position vacated by the promoted employee. In some cases these promotions had ripple effects, *i.e.*, a position vacated due to a promotion was filled by promoting another active employee but then his vacated position was not filled. Thus, for each of these promotions, United left some position vacant until after the end of the recall period specified in the Agreements.

United argued that its failure to fill the positions vacated by active employees who were promoted to a position for which a senior striker was eligible was adequate proof that the promotions were made to correct production imbalances. In other words, the only reason that United would leave a position vacant would be that there was not enough work to keep a person in that position occupied because of the problems in adjusting production flows after the strike.

The documentary evidence was inconclusive. A score or more of "Change of Status" slips were introduced but

they contributed nothing to the solution of the problem. The entries were made by many unidentified persons and were no more informative than "This employee qualifies for Code 470.6, Grade 8" (Ex. 87A), or "To fill vacancy as Test Mechanic" (Ex. 38A).

Naturally the persons charged with the entries describing the changes would not have been versed in the legal construction of the Strike Settlement Agreements. As United's counsel said "there would have been no reason in 1960 to make any such statement [that the promotion was a production adjustment made to avoid layoffs] at all . . . it is not a document which is designed to do that [state reasons for promotion]." (App. 214). And with the wisdom of hindsight he said "Of course, in 1960, if we knew we were going to be in court today, we would have made a lot of notes". (App. 214).

During the protracted argument between court and counsel, the court brought out the problem and inferentially the answer thereto:

> "THE COURT: How are we going to get those reasons, unless your Personnel Department has put something on the record? These were unusual times. Here the Company had a written agreement with the employees, that they would do certain things about rehiring from that list, for a very limited, stated period.
>
> Now, wasn't the company, wasn't it incumbent upon the company, weren't they obligated when they were going to—assume that they had a right to make these transfers, if that were the reason, didn't they have an obligation to put into the record somewhere—didn't they have to put the name of the man, Joe Doakes, that he was entitled to this job, but they were transferring this other man because they would have to lay him off otherwise—they didn't have to make that specific—but wasn't it in-

> cumbent upon them to make some record, to avoid a complete frustration of this strike settlement agreement?"

Although the court speaks of transfers, its thought is equally applicable to the promotions category.

With respect to the 38 promotions at issue here, the district court found:

> "that the challenged promotions in question were primarily attributable to the defendant's normal personnel policies and were not attributable to an imbalance in production; as so carried out, this conduct violated the Strike Settlement Agreements."

United was a party of the Strike Settlement Agreements. Although under ordinary circumstances it would be unusual to attribute an employee's promotion to a specific reason, particularly as technical a reason as "To relieve production imbalance", the situation between August and December 31, 1960 was not an ordinary one. In deciding between two parties, both of whom lack proof to substantiate their positions, it is equitable to require the party which had employee promotions under its control to bear the burden of proof or, more accurately, to suffer the consequences of the lack thereof. *See NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 34, 87 S.Ct. 1792, 18 L.Ed.2d 1027 (1967).

Judge Clarie properly interpreted our directions on remand and his findings of fact are not clearly erroneous. The judgment of the District Court, therefore is affirmed.

247 NLRB No. 174

D—5982
East Hartford, CT

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 1—CA—3355 (1—3),
1—CA—3357,
1—CA—3359,
1—CA—3528,
1—CA—3532,
1—CA—4201, and
1—CA—4492

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION)

and

LODGE #1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS, AFL-CIO

Case 1—CA—3396

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION)

and

EDWARD F. RABOWSKI, an Individual

Case 1—CA—4802

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION—
CONNECTICUT ADVANCED NUCLEAR
ENGINEERING LABORATORY)

and

LODGE #700, INTERNATIONAL ASSOCIATION OF
MACHINISTS, AFL-CIO

Cases 1—CA—3358,
1—CA—3372,
1—CA—3435,
1—CA—3455,
1—CA—3571,
1—CA—3634,
1—CA—4202, and
1—CA—4491

UNITED AIRCRAFT CORPORATION
(HAMILTON STANDARD DIVISION)

and

LODEGE #743, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

Case 1—CA—3434
Case 1—CA—3900

UNITED AIRCRAFT CORPORATION
(HAMILTON STANDARD DIVISION)

and

Case 1—CA—3900

FRANCIS J. KARCZ, an Individual

and

WILLIAM A. GRANT, an Individual

## SUPPLEMENTAL DECISION AND ORDER

On July 30, 1971, the National Labor Relations Board issued a Decision and Order in this case.[1] The Board found, *inter alia*, that Respondent did not violate Sec-

[1] 192 NLRB 382. Members Penello and Truesdale were not on the Board at the time and, therefore, did not participate in that Decision. Then Member Fanning and Member Brown filed a partial dissent to that decision, but their dissenting views pertained only to issues no longer before the Board in this Supplemental Decision.

tion 8(a)(3) and (1) of the Act when it terminated the employment preference rights of economic strikers upon the expiration of the parties' Strike Settlement Agreements (SSA), but that Respondent did violate Section 8(a)(3) and (1) in certain instances when—during the term of the SSA—it promoted or transferred junior active employees into jobs for which senior strikers were awaiting recall. The Board also found that Respondent did not otherwise discriminate against strikers in its administration of the striker-recall provisions of the SSA, and that it did not depress its employee complement during the post-strike period in order to undermine the Union. However, the Board did find that Respondent violated Section 8(a)(1) of the Act by the activities of certain of its supervisors, which included threats of economic reprisal, creating the impression of surveillance of employee union activity, and offering benefits conditioned upon abandonment of the strike. The Board ordered Respondent to cease and desist from the unfair labor practices found and take certain affirmative actions to remedy such practices.

On September 9, 1975, the United States Court of Appeals for the Second Circuit issued its decision[2] in this case. The court: (1) sustained the Board's finding—although on a diffeernt theory—that Respondent, under the circumstances, did not act unlawfully when it terminated the employment preference rights of economic strikers upon the SSA's expiration; (2) enforced the Board's Order remedying the 8(a)(1) violations committed by Respondent's supervisors; and (3) granted the Union's petition for review of the issues raised by the promotion and transfer of certain junior active employees and the reinstatement of nonstriking absentee employees —during the term of the SSA—into jobs for which strikers were awaiting recall. The court remanded the

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[2] *Lodge 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.*, 534 F.2d 422.

case to the Board for further consideration of the last issue in light of the court's opinion.[3] The Charging Parties filed a petition for a writ of certiorari in the Supreme Court of the United States which was denied on October 4, 1976.[4]

Thereafter, the Board accepted the remand and invited the parties to submit statements of positions concerning the issues raised by the remand. Such statements were filed by the General Counsel, Respondent, and the Charging Parties and a reply brief was filed by the Charging Parties.[5]

The Board having accepted the remand, the court's opinion is binding upon the Board for the purpose of deciding this case. Having duly considered the court's decision, and the statements of position, briefs, and memorandums filed by the parties, we make the following supplementary findings.

The facts are fully set out in our original Decision and in the opinion of the circuit court, and need not be

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[3] In addition, the court sustained the Board's finding that Respondent did not violate Sec. 8(a)(5) of the Act when it conditioned its agreement to provide the Unions with certain company records upon the Unions' payment of the costs incurred in supplying the requested documents. However, in disagreement with the Board, the court held that Respondent must bear the portion of such costs which is attributable to the deletion from these records of irrelevant nonbargaining unit information. As the record before the court was not sufficient to apportion such expenses, the court remanded this issue to the Board for determination during the compliance stage of this proceeding.

[4] 429 U.S. 825.

[5] On January 23 and February 2, 1979, respectively, the Charging Parties and the General Counsel filed supplemental memorandum, together with motions for leave to file them. In the absence of opposition thereto, those motions are granted and the memoranda are accepted.

reiterated here in detail.[6] At the conclusion of a 9-week economic strike in 1960, Respondent and the Unions executed a new collective-bargaining agreement and the SSA—the terms of which set forth procedures for the recall of strikers. Those strikers who wished to be recalled to work were to register during a 3-day period and thereafter were to be returned to work as follows: (1) if a stiker's prestrike job were available, he would be returned to that job; (2) if that job were not available, then, consistent with seniority and other factors not relevant to a determination of the issues herein, the striker would be recalled to certain other jobs that were available; and (3) strikers for whom no jobs were available under the first or second possibility would be placed on a preferential hiring list and placed in jobs which became available before the SSA expired on December 31, 1960.

Thereafter, the Unions became dissatisfied with Respondent's administration of the SSA and filed a suit under Section 301 of the Labor Management Relations Act in the United States District Court for the District of Connecticut alleging Respondent's breach of the SSA and seeking specific performance and monetary damages. They also filed unfair labor practice charges before the Board, alleging, *inter alia*, that Respondent violated Section 8(a)(3) and (1) of the Act by discriminating against registered strikers seeking recall. In support of the unfair labor practice charge alleging that Respondent discriminated against strikers during the term of the

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[6] Most of the issues litigated at various stages in this proceeding were finally determined by either the aforementioned decision of the Second Circuit or by the parties' acquiescence in determinations previously rendered by the Board in this case or by the United States District Court for the District of Connecticut in a related case, cited and discussed *infra*. Accordingly, the discussion and citation of facts set forth hereinafter will largely be confined to those matters which directly relate to the issues that are the subject of the Second Circuit's remand.

SSA, the General Counsel and the Charging Parties both relied on evidence identical to that offered by the Unions to show breach of the SSA in the Section 301 suit before the district court.[7]

In its decision in the Section 301 suit, the district court[8] found, *inter alia*, that Respondent had administered the SSA in good faith, but that the SSA had been breached in certain very limited instances involving the promotion or transfer of junior active employees into jobs for which senior strikers were awaiting recall. As indicated previously, the Board concluded in its Decision and Order that, in general, Respondent's actions were lawful and taken in good faith. However, the Board found violations of Section 8(a)(3) and (1) of the Act in those limited instances where the district court held that Respondent breached the SSA by promoting or transferring junior active employees into jobs which senior strikers were entitled to fill.

The Second Circuit's opinion dealt with both the Section 301 proceeding and the unfair labor practice proceeding.[9] The circuit court, in remanding, directed both the district court and the Board to reexamine Respondent's conduct in promoting and transferring junior active employees during the term of the SSA. In the Section 301 proceeding, the district court was directed to inquire into Respondent's reasons for effectuating the disputed promotions and transfers. In the Second Circuit's view, when the promotions and transfers were undertaken to

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[7] In response to motions filed by the General Counsel and the Charging Parties, the entire record in the district court case was received into evidence and made part of the record herein.

[8] *Lodges 743 and 1746, International Association of Machinists, AFL-CIO* v. *United Aircraft Corporation*, 299 F.Supp. 977 (D.C. Conn., 1969).

[9] The separate proceeding before the district court and the Board were consolidated for purposes of review by the Second Circuit and a single opinion covering both cases was issued.

correct post-strike production imbalances and to avoid the layoff of junior active employees, there was no breach of the terms of the SSA even though the junior active employees involved were thereby given jobs which would otherwise have been made available to unreinstated registered strikers. However, the SSA was breached when such personnel adjustments were made for other reasons [10] and had the effect of blocking the reinstatement of a striker or causing a striker to be reinstated to a lower rated position.

In the unfair labor practice proceeding, the Second Circuit directed that the Board made an independent legal assessment of whether the promotions and transfers violated the Act. To the extent that the Board's findings of unfair labor practices were pinned directly to the existence of SSA violations, the court's remand gave the Board the opportunity to reconsider its unfair labor practice findings in light of the circuit court's analysis of the SSA and of its impact upon Respondent's right to effectuate such promotions and transfers.

On December 13, 1978, the district court issued its decision on the remanded issues in the Section 301 suit.[11] Applying the criteria set forth by the Second Circuit, the district court held that the Unions had made out a *prima facie* case that the SSA was breached once they

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[10] The record shows that, prior to the strike which gave rise to this litigation, Respondent's normal personnel policy was to promote and transfer active employees into jobs which became available before offering such positions to employees in layoff status. The Second Circuit held that it would constitute a breach of the SSA recall provisions if Respondent's reason for effectuating the promotion or transfer of a junior active employee was application of that past practice respecting laid-off employees to senior registered strikers who possessed a superior entitlement to recall under the SSA.

[11] 100 LRRM 2446, 85 LC ¶ 11,075 (D.C. Conn., 1978).

established that junior active employees were promoted [12] at a time when senior strikers were awaiting recall to such positions. The district court also held that United Aircraft failed to meet its burden of substantiating with tangible record proof its contention that such promotions were made solely to deal with production imbalances and in order to keep active employees at work. Accordingly, the district court found that United Aircraft's conduct violated the SSA because the challenged promotions were primarily attributable to its normal personnel policies and were not an effort to correct an imbalance in production. Thereafter, on July 26, 1979, the Second Circuit [13] affirmed the district court's judgment on remand.

As recounted by the Second Circuit in its decision remanding this proceeding, the Trial Examiner (now Administrative Law Judge) issued his recommended decision in 1969, shortly after the district court handed down its opinion finding that United Aircraft had not breached the SSA except in certain limited respects. The Trial Examiner, like the district court, found United

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[12] The parties agreed, after review of the facts, that there were no violations of the SSA with respect to the "transfer" category which was remanded for reconsideration by the Second Circuit. It should be noted, however, that there were four other types of transfers—disadvantaging approximately 27 strikers—which were found violative of the SSA in the district court's initial decision, and which Respondent did not appeal. Accordingly, such findings of SSA violations are final and Respondent asserts that it has satisfied the district court's judgment in that regard.

The above-noted SSA violations were found with respect to the following categories of personnel adjustments: (1) transfers of junior active employees into jobs vacated by temporary "summer" hires; (2) transfers of certain "trainees" into seniority areas where senior registered strikers were awaiting recall; (3) transfers across seniority area lines by junior active employees; and (4) transfers of junior active employees into jobs for which registered strikers were awaiting recall after having waived their rights to other jobs.

[13] 534 F.2d 422 (2nd Cir. 1979), cert. denied 50 L. Ed. 87.

Aircraft generally acted in good faith in its administration of the SSA between the end of the strike and the December 31, 1960, expiration date of the SSA's recall provisions. The Trial Examiner further found, however, that United Aircraft had violated Section 8(a)(3) of the Act by ending the preferential hiring rights of strikers on December 31, 1960, as provided for by the SSA. In so doing, the Trial Examiner concluded that unrecalled former strikers were entitled to preferential hiring through April 1961, at which time all plants were back to full complements. The Trial Examiner found support for this conclusion in *The Laidlaw Corporation*, 171 NLRB 1366 (1968), enfd. 414 F.2d 99 (7th Cir. 1969), cert. denied 397 U.S. 920 (1970). There, the Board, with court approval, held that permanently replaced strikers whose jobs subseqeuntly became vacant because their replacements departed were entitled to reinstatement unless they had secured substantially equivalent employment elsewhere.

The Board adopted, with some modifications, most of the Trial Examiner's findings and recommendations. However, the Board reversed the Trial Examiner's finding that United Aircraft violated Section 8(a)(3) by cutting off the preferential hiring of strikers after December 31, 1960. In so doing, the Board, in effect if not explicitly, reasoned that the unions had bargained away the employees' *Laidlaw* rights.

In passing upon this aspect of the case the Second Circuit observed:

> . . . the issue of waiver by a union need not be decided in this case. In our view it is inaccurate to speak of statutory reinstatement rights having been waived here. The Supreme Court did not decide *Fleetwood* until 1967; the Board's decision in *Laidlaw* was not issued until 1968. We are at a loss to explain how the Union could make a knowing and

> voluntary waiver of the rights created by those cases when it had no way of knowing what those rights were. As matters stood in 1960, it was clear that strikers whose positions had been filled by permanent replacements or whose jobs had been abolished on the date they applied for reinstatement were not entitled to preferential employment treatment at that or any future time. . . . The employer's duty was simply not to discriminate against former strikers in hiring new employees. [534 F.2d at 451.]

Having determined that the Unions could not have knowingly waived the not-yet-in-existence *Laidlaw* and *Fleetwood*[14] rights, the court went on to consider whether *Laidlaw* and *Fleetwood* should be applied retroactively to 1960, a question which the court answered in the negative. In this connection, the court pointed out that *Laidlaw* and, to a somewhat lesser extent, *Fleetwood* were a sharp break with existing precedent in 1960. Given this, and in light of the finding by both the Board (in the unfair labor practice case) and district court (in the Section 301 case) that the Company had not sought in bad faith to discriminate against strikers, the circuit court refused to impose liability upon Respondent by the retroactive application of cases decided years after the events in issue.

In view of our acceptance of the remand, our resolution of the remanded issues will be made on the basis of the law as it stood before *Fleetwood* and *Laidlaw* issued.

At the outset, we agree with the Second Circuit that a fair reading of case law prior to *Fleetwood* and *Laidlaw* indicates that those strikers whose jobs were not avail-

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[14] *N.L.R.B.* v. *Fleetwood Trailer Co., Inc.*, 389 U.S. 375 (1967). There the Supreme Court held that economic strikers whose jobs were temporarily unavailable when they applied for reinstatement were entitled to an offer of reemployment in the event that jobs for which the strikers were qualified became available.

able at the end of the strike, whether because permanent replacements had been hired or because of strike-caused production dislocations, had no further statutory right to reinstatement other than the right not to be discriminated against in favor of new job applicants. Respondent contends that since strikers had no statutory right to be placed on a preferential hiring list, but only contractual rights accorded them under the SSA, violations of the SSA are not unfair labor practices. We disagree.

In several recent cases, albeit in a context different from that found here, we have had occasion to underline our conviction that by encouraging adherence to the provisions of collective-bargaining agreements we further "the express and fundamental policy of the Act to encourage the practice and procedure of collective bargaining as an important means for achieving industrial peace and stability." [15] Thus, we have specifically recognized that the breach of the provisions of a strike settlement agreement "runs counter to the basic policy of the Act to encourage the peaceful settlement of labor disputes through the practice and procedure of collective bargaining." [16]

On the other hand, when presented with a situation in which an employer has manipulated the terms of a strike settlment to achieve a discriminatory end, the Board has found a violation of Section 8(a)(3) by reason of the discriminatory application of the settlement agreement, without regard to whether the agreement itself was discriminatory. See, generally, *MCC Pacific Valves*, 244 NLRB No. 138 (1979). Thus, in *Laher Spring & Elec-*

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[15] *Stationary Engineers, Local 39, International Union of Operating Engineers, AFL-CIO (The San Jose Hospital and Health Center, Inc.)*, 240 NLRB No. 131 (1979), sl. op. at pp. 6-7. See also *Retail Clerks Union Local 1364, Retail Clerks International Association, AFL-CIO, et al. (Food Employers Counsel)*, 240 NLRB No. 132 (1979).

[16] *Food Employers Council, supra*, sl. op. at p. 7.

*tric Car Corp.*, 192 NLRB 464, 466 (1971),[17] the Board declined to "accord the literal terms of the agreement final and determinative weight." Further, the Board observed: "The policies of the Act would hardly be effectuated by our deferring to an agreement, the terms of which have been utilized by [the employer] in a manner [so] as to cloak discrimination against strikers."

Applying these principles to the instant case, and in light of the circuit court's remand and the record as a whole, we reaffirm the finding in our original Decision and Order in this proceeding that Respondent's overall administration of the SSA was lawful. As found by the circuit court, the SSA granted these strikers greater reinstatement rights than the rights ordinarily accorded strikers under then-existing and applicable labor law. Hence, to the extent Respondent complied with the terms of the SSA, its conduct was lawful under the requirements of the National Labor Relations Act. In this connection, we also reject any contention that the SSA itself, or any express term thereof, was "discriminatory" within the meaning of the Act.[18] Indeed, this follows generally from the finding that the SSA granted greater reinstatement rights to former strikers than the rights they would have had under then-applicable law. Moreover, we have examined the SSA and find nothing to indicate that any term of the agreement "discriminatorily" affected one group or classification of former strikers as opposed to any other strikers or to nonstriking employees.

With respect to breaches of the SSA by Respondent, we conclude that violations of the agreement were violations of the statute as well. As we have pointed out previously, it is an express and fundamental policy of the

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[17] That case is discussed in some detail by the Board in *MCC Pacific Valves, supra*, sl. op. at p. 12, fn. 16.

[18] Nor has there been a showing on this record that Respondent entered into the SSA with any discriminatory purpose.

Act to encourage the peaceful resolution of labor disputes through the practice and procedures of collective bargaining. The negotiation of the SSA by the parties was instrumental in ending a long and bitter strike. In those instances when Respondent acted in derogation of the SSA, of necessity its conduct adversely affected the employees' bargained-for rights to reinstatement and ran counter to the overriding national policy that encourages the peaceful resolution of labor disputes through collective bargaining. Thus, contrary to Respondent's contention that any breaches by it of the SSA were nothing more than violations of the Union's private contract rights, we conclude that such breaches of a strike settlement agreement are within the cognizance of the National Labor Relations Board and that, consistent with our obligations under the statute, such breaches when properly brought to our attention must be found and remedied by us in the public interest. Accordingly, since Respondent's violations of the SSA in effect denied reinstatement of individuals who had done no more than exercise their statutory right to engage in protected concerted activity in support of the Charging Parties, we find that such individuals have been discriminated against within the meaning of Section 8(a)(3) and (1) of the Act.

As indicated previously, in its decision on remand, as subsequently affirmed by the circuit court, the district court concluded that Respondent breached the terms of the SSA: (1) when it promoted certain junior active employees when seven former strikers were awaiting reinstatement to those jobs; and (2) with respect to four categories of "transfers" (detailed herein at fn. 12, *infra*). For the reasons expressed earlier, we find that these breaches of the SSA were also violative of Section 8(a)(3) and (1) of the Act.

As for Respondent's reinstatement of nonstriking employees who were absent from work during part or all of the strike period, we conclude from all the surround-

ing facts and circumstances that Respondent's conduct in this regard was lawful. In so concluding, we rely on the evidence that reinstatement was offered *only* to those individuals who supplied satisfactory proof that their absence was due to factors which would have been acceptable to Respondent prior to the strike. Hence, there is no evidence that Respondent extended an unlawful preference to individuals in the group as compared to strikers. In this connection, we also agree with the observation of the circuit court that, in the circumstances of this case, and particularly since prior to the strike those absent for valid personal reasons did not run the risk of losing their jobs, "[i]t would have been manifestly unjust to expose them to the same risks as strikers merly because of the fortuity that the cause of their absence occurred during a strike." (534 F.2d at 445.) In sum, we conclude that the jobs of such absentees were not "available" at the end of the strike. Hence, Respondent's failure to offer such jobs to registered strikers awaiting reinstatement was not "discrimination" within the meaning of the Act.

Finally, with respect to the remanded issue relating to Respondent's obligation to provide the Unions with information relevant and necessary for intelligent bargaining and contract administration, we reaffirm our previous findings, except that the costs of deleting nonbargaining unit data be borne by Respondent. Accordingly, unless the parties can agree on a breakdown between reproduction costs and deletions costs, the amount owed by the Unions shall be determined during the compliance stage of this proceeding.

## ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby reaffirms its prior Decision and Order in this proceeding (reported at 192 NLRB 382), as modified below, and hereby orders that the Respondent, United

Aircraft Corporation, East Hartford, Connecticut, its officers, agents, successors, and assigns, shall take the action set forth in said prior Order, as modified herein:

1. Add the following as paragraph 1(c) and reletter paragraph 1(c) as (d):

"(c) Discriminating against employees by denying them reinstatement as a result of violations of the Strike Settlement Agreement."

2. Delete paragraph 2(c) and reletter the remaining paragraphs accordingly.

3. Substitute the attached notice for the original notice attached to the Board's prior Decision and Order.

Dated, Washington, D.C. February 13, 1980.

JOHN H. FANNING, Chairman

HOWARD JENKINS, JR., Member

JOHN C. TRUESDALE, Member

[SEAL] NATIONAL LABOR RELATIONS BOARD

## APPENDIX

## NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found, after a hearing that we violated Federal law by certain conduct, and has ordered us to post this notice. We hereby notify our employees that:

WE WILL NOT threaten our employees with reprisals because they engage in union activities.

WE WILL NOT question our employees about their union acivities so as to create the impression that we are unlawfully watching those activities.

WE WILL NOT promise benefits to our employees in order to discourage them from engaging in union activities.

WE WILL NOT discourage membership in Lodge #1746, Lodge #743, and Lodge #700, International Association of Machinists, AFL-CIO, or any other labor organization of our employees, by transferring or promoting them to positions in violation of the Strike Settlement Agreements.

WE WILL NOT discriminate against our employees by denying them reinstatement as a result of violations of the Strike Settlement Agreements.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

East Hartford, CT

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 1—CA—3355 (1—3),
1—CA—3357,
1—CA—3359,
1—CA—3528
1—CA—3532,
1—CA—4201, and
1—CA—4492

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION)

and

LODGE #1746, INTERNATIONAL ASSOCIATION OF
MACHINISTS, AFL-CIO

Case 1—CA—3396

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION)

and

EDWARD F. RABOWSKI, an Individual

Case 1—CA—4802

UNITED AIRCRAFT CORPORATION
(PRATT AND WHITNEY DIVISION—
CONNECTICUT ADVANCED NUCLEAR
ENGINEERING LABORATORY)

and

LODGE #700, INTERNATIONAL ASSOCIATION OF
MACHINISTS, AFL-CIO

Cases 1—CA—3358,
1—CA—3372,
1—CA—3435,
1—CA—3455,
1—CA—3571,
1—CA—3634,
1—CA—4202, and
1—CA—4491

UNITED AIRCRAFT CORPORATION
(HAMILTON STANDARD DIVISION)

and

LODGE #743, INTERNATIONAL ASSOCIATION OF MACHINISTS, AFL-CIO

Case 1—CA—3434
Case 1—CA—3900

UNITED AIRCRAFT CORPORATION
(HAMILTON STANDARD DIVISION)

and

FRANCIS J. KARCZ, an Individual

and

WILLIAM A. GRANT, an Individual

## ORDER DENYING MOTIONS

On February 13, 1980, the National Labor Relations Board issued a Supplemental Decision and Order [1] in the above-entitled proceeding. Therein, the Board reaffirmed its finding that Respondent's overall administration of the Strike Settlement Agreements (SSA) executed by the parties was lawful. In addition, the Board found, *inter alia*, that neither the SSA nor any term thereof was "discriminatory" within the meaning of the National Labor Relations Act, and that there was no showing that Respondent entered into the SSA with any discriminatory purpose. However, the Board also found, for reasons fully set forth in the Supplemental Decision and Order, that Respondent's breaches of the SSA were a violation of the Act as well. In view of these findings and conclusions, and to provide an appropriate remedy for the violations found, the Board reaffirmed its original Decision and Order.[2] with certain modifications detailed in the Supplemental Decision and Order.

On April 1, 1980,[3] the Charging Parties filed a Motion for Reconsideration or Rehearing in Part by the Panel and by the Full Board and Motion for Oral Argument on, and Expedited Adjudication of, Motion for Reconsideration on Rehearing. On April 16, 1980, the Respondent filed a Reply to the Motions. On April 28, 1980, the Charging Parties filed an Answer to Respondent's Reply and amended its Motion for Expedited Adjudication. Thereafter, on May 7, 1980, the Charging Parties filed a Second Amendment to its motion and, on May 23, 1980, a Third Amendment. On June 16, 1980, the Counsel for the General Counsel filed a "Response" to the General

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[1] 247 NLRB No. 174.

[2] 192 NLRB 382.

[3] On February 28, 1980, the Board's Associate Executive Secretary granted the Charging Parties request for an extension of time to April 3, 1980, to file its Motion for Reconsideration.

Counsel's brief; on August 1, 1980, Charging Parties filed their Fourth Amendment to their motion; and, on August 11, 1980, counsel for the General Counsel filed a Statement that the General Counsel saw no need for further response to Respondent's reply.

In support of their motions the Charging Parties contend that the Board failed to comply with the terms of the remand in this proceeding from the United States Court of Appeals for the Second Circuit.[4] In this connection, the Charging Parties maintain, *inter alia*, that the Board erred in concluding that the Respondent's adherence to the terms of the SSA executed with the Charging Parties necessarily foreclosed a finding that Respondent's personnel policies during the effective dates of the SSA were discriminatory and in violation of the National Labor Relations Act. Similarly, in his brief in Support of the Charging Parties' Motion, Counsel for the General Counsel argues that the Board failed to furnish sufficient rationale for concluding that Respondent violated the Act only in those limited instances when it violated the terms of the SSA.

In its Reply to the motions, Respondent denies that any conduct it engaged in during the period covered by the SSA was discriminatory and violative of the Act. Furthermore, it asserts that the Charging Parties' Motions and their arguments in support thereof are an attempt now to expand the original complaint in the underlying unfair labor practice proceeding by urging the Board, in effect, to permit relitigation of this case on a theory specifically disavowed by Counsel for the General Counsel at the original unfair labor practice hearing.

The Board has carefully considered the motions and the various briefs filed in support of, or in reply to the

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[4] *Lodge 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO* v. *N.L.R.B.*, 534 F.2d 422 (2nd Cir. 1975).

motions, and has concluded that the Supplemental Decision and Order which is the subject of the motions adequately sets forth the Board's findings and the reasons therefor. Accordingly,

IT IS HEREBY ORDERED that the Charging Parties' motions be, and they hereby are denied as lacking in merit and containing nothing not previously considered.

Dated, Washington, D.C., August 25, 1980.

By direction of the Board:

ROBERT VOLGER
*Acting Executive Secretary*

[N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.]

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of July, one thousand nine hundred and eighty-one.

Present: HONORABLE J. EDWARD LUMBARD,
HONORABLE THOMAS J. MESKILL,
*Circuit Judges*
HONORABLE MORRIS E. LASKER,
*District Judge.**

Docket Nos. 80-4181, 80-4219

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LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Petitioners,*
v.
NATIONAL LABOR RELATIONS BOARD,
*Respondent,*
and
UNITED TECHNOLOGIES CORPORATION,
*Intervenor.*

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NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*
v.
UNITED AIRCRAFT CORPORATION,
*Respondent,*
and
LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Intervenors.*

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[Filed Jul. 10, 1981]

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* Honorable Morris E. Lasker, United States District Judge for the Southern District of New York, sitting by designation.

This is a petition for review and application for enforcement of an order of the National Labor Relations Board (Board) which held that respondent employer engaged in conduct in violation of § 8(a)(1) and (3) of the NLRA, and directed the respondent to reinstate certain employees with back pay with interest, to post notices advising the workforce of the outcome of the suit, and to cease and desist from committing any further acts in violation of the NLRA. The petition and application were argued by counsel on June 1, 1981.

This is the fourth occasion that this court has been called upon to review decisions of the Board and the district court in the course of this protracted litigation. *See* 327 F.2d 5 (2d Cir. 1964) (*United I*); 534 F.2d 422 (2d Cir. 1975) (*United II*); and 604 F.2d 4 (2d. Cir. 1979) (*United III*). Contrary to the suggestion of the Unions here, in *United II* we did not direct the Board on remand to disregard the district court's finding in the § 301 suit and independently make its own determinations as to whether any of the transfers or promotions between September-December 1960 constituted either a breach of the strike settlement agreement (SSA), a § 8 violation, or both. Indeed, we noted in *United II* with respect to the Board's other adopted findings, that "[w]hile adoption of the findings of the district court is unquestionably a novel approach to adjudication, because the Board made an independent examination and appraisal of the evidence, the procedure need not be condemned." 534 F.2d at 456. Since the Board previously reviewed all of the evidence, it was free to adopt the findings made by Judge Clarie in the remanded § 301 action.

As in *United II*, we believe that it was permissible for the Board to use the district court's findings as a "referent," *see* 534 F.2d at 457, and rule that any conduct that was consistent with the SSA was also consistent with the National Labor Relations Act. The only directive given to the Board in this regard in *United II* was that it de-

termine whether the SSA itself was lawful and non-discriminatory. We suggested to the Board in *United II* that it could not determine that the Company's conduct was not violative of the Act merely by finding that it was consistent with the SSA, *unless* it first determine that the SSA itself was lawful and non-discriminatory within the meaning of the Act. 534 F.2d at 457. On remand, the Board complied with our directive, stating "As found by the circuit court, the SSA granted these strikes greater reinstatement rights than the rights ordinarily accorded strikers under then-existing law. Hence, to the extent Respondent complied with the terms of the SSA, its conduct was lawful under the requirements of the National Labor Relations Act." A. 157-58. Contrary to the Union's contention on this appeal, we held in *United II* that *NLRB* v. *Fleetwood Trailer Co., Inc.*, 398 U.S. 375, 381 (1967) and *The Laidlaw Corporation*, 171 N.L.R.B. 1366 (1968), *enforced*, 414 F.2d 99 (7th Cir. 1969), *cert. denied*, 397 U.S. 920 (1970), which broadened the reinstatement rights of registered strikers, are inapplicable to this action. We stated that the law as it existed in 1960 governs the reinstatement rights of the registered strikers and that "those strikers whose jobs were not available when the strike terminated, whether because they had been permanently replaced or because of production dislocations causd by the strike, had no further statutory right to reinstatement other than not to be discriminated against in favor of other new applicants for employment." 534 F.2d at 453. Finally, the Unions' eleventh hour contention that the Board's recent decision in *Giddings & Lewis, Inc.*, 255 N.L.R.B. No. 93, should be applied to this case is likewise without merit. That decision is another of the progeny of *Fleetwood Trailer* and *Laidlaw*, cases which we held in *United II* should not be retroactively applied to this case. We see no reason to disturb the Board's determination that the only possible violations of the Act committed by the Company during the term of the SSA involved conduct in violation

of the SSA, since we are satisfied that the SSA accorded the strikers reinstatement rights equal to or greater than the rights governed by then-existing law.

We also conclude that the Board did not err in determining that the 45 promotions and 27 unchallenged transfers which the district court held violated the SSA also violated § 8(a)(3) of the Act.[1] We noted in *United II* that violations of the Act could coincide with violations of a collective bargaining or strike settlement agreement. 534 F.2d at 457. The Company claims, however, that the Board's ruling in this case is tantamount to holding that violations of collective bargaining agreements are *per se* violations of the labor laws. Obviously, such a rule would directly conflict with the policies that underlie the NLRA and LMRA. *See Charles Dowd Box Co. v. Courtney*, 368 U.S. 502, 510-11 (1962). While the jurisdiction of the Board is not ousted when the underlying facts give rise to a suit under § 301(a), *see United I, supra*, 337 F.2d at 10, it is clear beyond cavil that every violation of a collective bargaining agreement cannot constitute a violation of the Act. But as we noted in *United II* "in some instances contractual violations may violate the Act." 534 F.2d at 457. In the case at bar, the Board found that in 72 instances the Company denied reinstatement to registered strikers by improperly transferring or promoting existing employees over unrecalled registered strikers. These actions amounted to more than mere contractual violations; the 72 relevant transfers and promotions impinged the legal reinstatement rights of those unrecalled strikers which had been incorporated in the SSA. The actions had the effect of discriminating in favor of non-striking employees over unrecalled strikers. Under the facts presented here, the Board did not err in

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[1] In light of our decision, we need not pass on the question whether the Company's conduct also violated § 8(1)(1) of the Act.

ruling that the acts of the Company which transgressed the SSA also violated § 8(a)(3) of the Act.

ON CONSIDERATION WHEREOF, it is now ordered, adjudged, and decreed that the order of the Board be enforced and the petition for review denied.

/s/ J. Edward Lumbard
J. EDWARD LUMBARD
U.S.C.J.

/s/ Thomas J. Meskill
THOMAS J. MESKILL
U.S.C.J.

/s/ Morris E. Lasker
MORRIS E. LASKER
U.S.D.J.

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of September, one thousand nine hundred and eighty-one.

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Nos. 80-4181
80-4219

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Petitioners,*

—v—

NATIONAL LABOR RELATIONS BOARD,
*Respondent,*

UNITED TECHNOLOGIES CORPORATION,
*Intervenor.*

---

NATIONAL LABOR RELATIONS BOARD,
*Petitioner,*

—v—

UNITED AIRCRAFT CORPORATION,
*Respondent,*

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Intervenors.*

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[Filed Sep. 11, 1981]

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the petitioners, Lodges 743 and 1746, International Association of Machinists and Aerospace Workers, AFL-CIO,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing be DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. Daniel Fusaro
A. DANIEL FUSARO
Clerk

by /s/ Francis X. Guidhart
FRANCIS X. GUIDHART
Chief Deputy Clerk

SUPREME COURT OF THE UNITED STATES

No. A-471

LODGES 743 and 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Petitioners*
v.

NATIONAL LABOR RELATIONS BOARD

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## ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

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UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorai in the above-entitled cause be, and the same is hereby, extended to and including January 11, 1982.

/s/ Thurgood Marshall
Associate Justice of the
Supreme Court of the
United States

Dated this 3rd day of December, 1981.

## STATUTE APPENDIX

Relevant provisions of the National Labor Relations Act of 1935, as amended, 49 Stat. 453, 29 U.S.C. § 151, *et seq.*, are as follows:

Sec. 2. When used in this subchapter—

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute * * *.

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

Sec. 8(a). It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

* * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization * * *

Sec. 13. Nothing in this subchapter, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

# Opposition

Office - Supreme Court, U.S.
FILED
FEB 12 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1297

# In the Supreme Court of the United States

OCTOBER TERM, 1981

LOCAL LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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*Department of Justice*
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ROBERT E. ALLEN
*Acting Associate General Counsel*

NORTON J. COME
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LINDA SHER
*Assistant General Counsel*

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## QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, the Board properly limited its determination of whether the Company's administration of the strike settlement agreement violated Section 8(a)(3) and (1) of the National Labor Relations Act to those instances where the district court, in a related proceeding under Section 301 of the Labor-Management Relations Act of 1947 had found that the Company had breached the strike settlement agreement.

2. Whether the Board properly concluded that the Company's recall of certain non-striker absentees and its transfers of certain apprentices into the bargaining unit did not violate Section 8(a)(3) and (1) of the Act.

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# In the Supreme Court of the United States

OCTOBER TERM, 1981

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No. 81-1297

LOCAL LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO, PETITIONERS

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 38a-42a) ("*United IV*") is unreported. It enforces the Board's supplemental decision and order (Pet. App. 17a-32a), which is reported at 247 N.L.R.B. No. 174. The Board's original decision and order is reported at 192 N.L.R.B. 382, and the opinion of the court of appeals affirming that decision and order in part and remanding it in part is reported at 534 F. 2d 422 ("*United II*").

The original decision of the district court in a companion proceeding is reported at 299 F. Supp. 877. That decision was also affirmed in part and remanded in part by the court of appeals in *United II*. The district court's supplemental

decision on remand (Pet. App. 1a-10a) is reported at 100 L.R.R.M. 2446. The opinion of the court of appeals affirming that decision is reported at 604 F. 2d 4 (Pet. App. 11a-16a) ("*United III*").

## JURISDICTION

The judgment of the court of appeals was entered on July 10, 1981 (Pet. App. 38a). On September 11, 1981, the court of appeals denied the Union's petition for rehearing (Pet. App. 43a-44a). By order dated December 3, 1981 (Pet. App. 45a), Justice Marshall extended the time for filing a petition for a writ of certiorari to and including January 11, 1982, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, 29 U.S.C. 151 *et seq.* (hereinafter "the Act") are set forth at Pet. App. 46a-47a.

## STATEMENT

### A. The 1960 Strike and the Strike Settlement Agreements[1]

On June 8, 1960, petitioners (collectively "the Union") launched an economic strike against United Aircraft's[2] Pratt & Whitney Division and Hamilton Standard Division. The strike lasted nine weeks. In compliance with the strike settlement terms agreed on in August 1960, the Company and the Union reached accord on new collective bargaining contracts, agreed to submit to arbitration the cases of 50 strikers accused of serious misconduct, and agreed on a procedure to govern the recall of strikers. The procedure

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[1]The facts set forth in this section are derived from the opinion of the court of appeals in *United II*, 534 F. 2d at 429-432.

[2]United Aircraft Corporation, now known as United Technologies Corporation, will hereinafter be referred to as "the Company."

was embodied in two strike settlement agreements (collectively "the SSA"), one for the employees in each Division. 534 F. 2d at 429.

Under the SSA, strikers who wished to return to work were required to register at their respective plants and were to be recalled in three phases. Under Phase 1, strikers whose pre-strike jobs were available at the end of the strike were to be reinstated to those jobs. If a striker's pre-strike job was not available, he was to be recalled, under Phase 2, to certain other defined jobs for which he was qualified.[3] Finally, strikers for whom no jobs were available under Phase 1 or 2 were to be placed on a preferential hiring list for recall to job openings in their occupational groups and seniority areas which developed at any time prior to January 1, 1961. 534 F. 2d at 430-431.

Out of a total of 6,536 registered strikers, 3,023 were recalled to their identical jobs, 897 were recalled under Phase 2, and 630 were recalled under Phase 3. Excluding those who resigned or were otherwise unavailable, 1562 registered strikers had not been recalled by January 1, 1961, when the SSA expired. 534 F. 2d at 431-432.

Dissatisfied with various aspects of the Company's administration of the SSA, the Union filed unfair labor practice charges with the Board, and instituted a suit under Section 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. 185, in the United States District Court for the District of Connecticut, alleging breaches of the SSA.

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[3]The language of the recall agreements for the Pratt & Whitney and Hamilton Standard divisions differed slightly. Under the former agreement, strikers would be recalled "to other available jobs in their occupational groups and seniority areas in accordance with their seniority." Under the Hamilton Standard agreement, strikers would be recalled "to comparable or other available jobs in accordance with their seniority and demonstrated ability." 534 F. 2d at 431 n.3.

## B. The Initial Court and Board Proceedings

1. On March 20, 1969, the district court issued its decision in the Section 301 suit, finding that the Company had administered the SSA in good faith and rejecting most of the Union's claims of Company breaches thereof. *Lodge 743, International Association of Machinists* v. *United Aircraft Corp.*, 299 F. Supp. 877 (D. Conn. 1969).

The district court found a breach of the SSA only with respect to 72 transfers and promotions (299 F. Supp. at 913-922; *United II*, 534 F. 2d at 439)[4] transfers of 21 junior active employees across occupational groups and seniority areas into jobs for which senior registered strikers were awaiting recall; transfers of two trainees into occupational groups and seniority areas where senior registered strikers were awaiting recall; transfers of four junior active employees to fill jobs vacated by "summer hires" where senior registered strikers were awaiting recall; and promotions of 45 junior active employees when senior registered strikers were awaiting recall to the job to which the promotion was made (A. 239-242).[5]

The district court rejected the Union's contention that other transfer and promotion policies which prevented the recall of strikers breached the SSA. Among the practices found lawful were the transfer of junior active employees

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[4]During the term of the SSA, the Company made a total of 3,320 transfers, promotions, and demotions among its active employees. These consisted of 1,772 lateral transfers or demotions and 643 promotions at Pratt & Whitney, and 732 lateral transfers or demotions and 173 promotions at Hamilton Standard. (A. 213-233.) ("A." refers to the joint appendix in the court below in *United IV*.)

[5]The district court also found violative of the SSA transfers of active employees to jobs for which registered strikers, who had previously signed a waiver of their right to be recalled to another job, were awaiting recall. However, it was ultimately determined (A. 234) that no registered strikers were in fact prejudiced by these transfers.

*within* the same occupational code and seniority area to jobs for which senior registered strikers were awaiting recall, and the promotion and transfers of apprentices to bargaining unit jobs for which registered strikers were awaiting recall. 299 F. Supp. at 916-917, 922-923.

The district court further found that the Company did not violate the SSA in returning to work as regular employees those individuals who were absent from work during the strike for valid personal reasons. The court explained that "such reasons under ordinary and usual circumstances would have been acceptable as justifying absence before the strike occurred." 299 F. Supp. at 897.

2. The Board proceeding in substantial part covered the same ground as the district court proceeding; the record in the Section 301 proceeding was placed in the judicial notice file of the Board proceeding;[6] and the Trial Examiner and the Board considered that record and the district court's findings in making their findings in the Board proceeding. On July 30, 1971, the Board issued its decision holding that the SSA did not violate the Act and the Company's administration of the SSA violated the Act to only a limited extent. *United Aircraft Corp.*, 192 N.L.R.B. 382 (1971).

Thus, the Board, after making an independent examination of the record in the district court proceeding and determining that the General Counsel and the Union had relied on essentially the same evidence in the Board proceeding, decided to adopt the district court's basic findings that the Company acted in good faith throughout the period of the SSA and that production imbalance and parts shortages were the cause of the reduced employee complements and the concomitant failure to reinstate all strikers.

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[6]The Board subsequently granted the motion of the Union and the General Counsel to make the entire record of the Section 301 proceeding part of the record of the Board proceeding (A. 114).

192 N.L.R.B. at 384-385. Further adopting the findings of the district court, the Board concluded that those transfers and promotions of junior employees found by the court to violate the SSA were also violative of Section 8(a)(3) and (1) of the Act. *Id.* at 385.

The Board then considered whether the SSA itself was a valid waiver of the strikers' reinstatement rights under the Act. Rejecting the view of the Trial Examiner that the Board's 1968 decision in *Laidlaw Corp.*, 171 N.L.R.B. 1366, enforced, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970),[7] should override the SSA, the Board concluded that the statutory policy of encouraging the practice and procedure of collective bargaining would be furthered by giving effect to the limitation on the strikers' reinstatement rights adopted by the parties in their strike settlement agreement. Accordingly, the Board held that the Company did not violate Section 8(a)(3) and (1) of the Act by denying the strikers, in conformity with the terms of the recall agreement, preferential hiring rights, and treating them as applicants for new employment, after December 31, 1960. 192 N.L.R.B. at 386-388.

3. The court of appeals consolidated the Section 301 and Board proceedings for review. *United II*, 534 F. 2d at 430.

a. With respect to the Section 301 case, the court of appeals affirmed the district court's findings that the Company had administered the SSA in good faith. 534 F. 2d at 438. It also agreed with the district court that the SSA gave each registered striker recall rights only to jobs in his own

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[7]There, the Board, applying the principles enunciated in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), reversing 366 F. 2d 126 (9th Cir. 1966), held that an economic striker does not lose his right to reinstatement merely because a permanent replacement is in his job when he initially applies for work; in the absence of a legitimate and substantial business justification, the employer is obligated to reinstate him should an appropriate job subsequently become available.

seniority area or occupational group. *Id.* at 432 n.4. Thus, the Company's failure to consider strikers for recall to openings *across* seniority areas or occupational groups did not violate the SSA.

However, the court of appeals disagreed with the district court's view that transfers of junior employees *within* a seniority area or occupational group in preference to senior strikers could not violate the SSA because the parties intended to treat registered strikers as if they had been laid off. Finding that the SSA "restricted somewhat the freedom to promote and transfer that the Company might have enjoyed during a layoff" (534 F. 2d at 440), the court of appeals held that lateral transfers, demotions, and promotions made for the purpose of correcting a production imbalance and avoiding the layoff of an active employee would not constitute breaches of the SSA. However, personnel adjustments made for other reasons which had the effect of blocking reinstatement of a registered striker or causing his reinstatement to a lower position would violate the SSA. *Id.* at 442-443.

Applying these principles, the court of appeals determined that, since recall under the SSA at Pratt & Whitney was by seniority area and occupational group, no transfer made at Pratt & Whitney could have breached the SSA. For, even transfers made for purposes other than correcting a production imbalance and avoiding the layoff of an active employee would necessarily have had the concomitant effect of opening up positions within the same occupational group and seniority area which the strikers could fill. 534 F. 2d at 443. Since at Hamilton Standard the concept of "demonstrated ability," rather than "occupational group," was used to determine right of recall within a seniority area, it was not inevitably true that a transfer within a seniority area, not made to correct a production imbalance and avoid a layoff, would open up a position for a registered striker.

Accordingly, it was necessary to remand this aspect of the case to the district court to afford the Union an opportunity to show that transfers occurred at Hamilton Standard for reasons other than to correct a production imbalance and that they deprived a registered striker of reinstatement. Similarly, with respect to the 45 promotions found by the district court to have breached the SSA, the court of appeals found itself unable to determine whether or not they had been made as a matter of production adjustment, and therefore also remanded that issue to the district court to inquire into the Company's reasons for the 45 promotions. *Id.* at 443-444.[8]

The court of appeals affirmed the conclusion of the district court that the immediate reinstatement of the non-striker absentees did not violate the SSA. It noted that the SSA was silent on the issue and refused to draw the inference that employees absent for valid personal reasons or a fear of violence were subject to its terms since it "would have been manifestly unjust to expose them to the same risks as strikers merely because of the fortuity that the cause of their absence occurred during a strike." 534 F. 2d at 445.

b. Turning next to the Board's decision, the court sustained, albeit on a different theory, the Board's finding that the Company did not violate Section 8(a)(3) and (1) of the Act by curtailing preferential hiring of strikers after December 31, 1960. 534 F. 2d at 448-454.[9] The court further

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[8]The Company did not appeal the 27 other violations of the SSA found by the district court. 534 F. 2d at 439-440 & n.25; see also page 4, *supra*.

[9]The court of appeals found it unnecessary to determine whether a union may waive striker reinstatement rights by contract. In the court's view (534 F. 2d at 452), at the time the parties entered into the agreement in 1960, the state of the law was such that the Union could not have knowingly waived the statutory right to reinstatement ultimately accorded strikers under *Fleetwood* and *Laidlaw*.

held that, since the Board had made an independent examination and appraisal of the evidence, it could properly adopt, as it did, the findings of the district court, including the finding that the Company had acted in good faith throughout the period of the SSA. *Id.* at 455-456. However, the court found that it was unclear how the Board had arrived at its conclusion that the Company violated the Act through the promotions and transfers of certain junior active employees and the reinstatement of nonstriking absentee employees into jobs for which strikers were awaiting recall. *Id.* at 456-457, 457 n.60. The court, therefore, remanded these issues to the Board with directions to articulate the bases for its conclusions. *Id.* at 457-458.

In remanding the issue of promotions and transfers, the court pointed out that it was unclear whether the Board's "findings of unfair labor practices (or absence thereof) were pinned directly to the presence or absence of a Strike Settlement Agreement violation" (534 F. 2d at 457), or whether the Board had undertaken "to make an independent assessment of whether the Act was violated by transfers and promotions" (*id.* at 456). If the Board had adopted the latter course, a remand was necessary to enable it to explain how it "reached its conclusion that some transfers and promotions were unfair labor practices and others were not" (*ibid.*).[10] On the other hand, if the Board had adopted the alternative of pinning its unfair labor practice findings to breaches of the SSA, a remand was still necessary to enable the Board to reconsider its findings in light of the court's "altered construction of the contract" (*id.* at 457). The court

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[10] "For example," the court added, "why are transfers *across* seniority area lines which denied reinstatement to a striker (an 8(a)(3) violation according to the Board) any more likely to encourage or discourage membership in a labor organization than transfers *within* the same seniority area (not a violation of 8(a)(3)) which had the same effect?" 534 F. 2d at 456; emphasis in original.

noted (*ibid.*; footnote omitted) that "[i]t was not sufficient for unfair labor practice purposes to say that certain conduct did not violate the Agreements, for the Board is by statute expressly empowered to override private arrangements." However, it concluded (*ibid.*): "[T]hat is not to say that the Strike Settlement Agreements, as we have interpreted them here, cannot serve as a referent for the Board * * *. [T]he Board's unfair labor practice findings may well coincide with the breaches of the Agreement we have found."

The Union's petitions for a writ of certiorari with respect to both the Section 301 case and the Board case were denied by this Court on October 4, 1976. 429 U.S. at 825.

C. The Subsequent District Court Proceedings

On December 13, 1978, the district court issued its decision with respect to the remand issues (Pet. App. 1a-10a). Because the parties agreed, after review of the facts, that no violations of the SSA had occurred with respect to the transfers at Hamilton Standard (Pet. App. 5a), the only issue remaining for resolution by the district court was that concerning the 45 promotions at both plants initially found to be violative of the SSA.

Applying the criteria set forth in *United II*, the district court held that the Union had made out a *prima facie* case of a violation of the SSA by establishing that junior active employees were promoted when senior strikers were awaiting recall to such positions (Pet. App. 8a). The court further held that the Company had failed to carry its burden of establishing its affirmative defense that the promotions were made solely to deal with production imbalances and production needs, and that any recall of strikers would have necessitated the layoff of active employees (Pet. App. 9a). Accordingly, the court found that the Company violated

the SSA by promoting 45 active employees when senior strikers were awaiting recall to those positions (Pet. App. 10a).

On July 26, 1979, the court of appeals affirmed the district court's decision (Pet. App. 11a-16a (*United III*)).

D. The Subsequent Board Proceedings

1. The Board on remand (Pet. App. 17a-31a) made clear that it had adopted the option afforded by the court of appeals of using the SSA as a referent and pinning the findings of a statutory violation to the presence or absence of a SSA violation.

At the outset, the Board, pursuant to the court's admonition that "the existence of these Agreements does not relieve the Board of its duty to determine whether the contract itself was unlawfully discriminatory within the meaning of the Act" (534 F. 2d at 457), re-examined the SSA. Accepting the court's determination that "the SSA granted these strikers greater reinstatement rights than the rights ordinarily accorded strikers under then-existing and applicable labor law[,]"[11] and finding "nothing to indicate that any term of the agreement 'discriminatorily' affected one group or classification of former strikers as opposed to any other strikers or to non-striking employees," the Board concluded that, to the extent the Company "complied with the terms of the SSA, its conduct was lawful under the requirements of the National Labor Relations Act" (Pet. App. 28a).

The Board then concluded that, insofar as the Company violated the SSA, it also violated Section 8(a)(3) and (1) of the Act. The Board explained (Pet. App. 28a-29a) that it

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[11]Consistent with the prior holding of the court of appeals (page 8, note 9, *supra*), the Board declared that its "resolution of the remanded issues will be made on the basis of the law as it stood before *Fleetwood* and *Laidlaw* issued" (Pet. App. 26a).

was the "express and fundamental policy of the Act to encourage the peaceful resolution of labor disputes through the practice and procedure of collective bargaining," and that the Company's action in derogation of the SSA necessarily ran counter to this "overriding national policy" and "adversely affected the employees' bargained-for rights to reinstatement." Accordingly, "since [the Company's] violations of the SSA in effect denied reinstatement of individuals who had done no more than exercise their statutory right to engage in protected concerted activity in support of the [Union], we find that such individuals have been discriminated against within the meaning of Section 8(a)(3) and (1) of the Act" (Pet. App. 29a). For the identification of the specific instances in which the Company breached the SSA, the Board adopted the findings of the district court with respect to the 45 promotions and the 27 transfers which it had found to violate the SSA (*ibid.*).

Finally, the Board found that the Company's reinstatement of nonstriker absentees in preference to senior strikers was not discrimination within the meaning of the Act. The Board noted that the absentees had supplied proof that their absences were due to factors that would have been acceptable to the Company prior to the strike, and concluded that, in the circumstances of this case, it would be unjust to expose the absentees to the risk of loss of jobs " 'merely because of the fortuity that the cause of their absence occurred during a strike' " (Pet. App. 29a-30a, quoting *United II*, 534 F. 2d at 445).

2. The court of appeals rejected the Union's contention that the Board had been directed, under the terms of the remand in *United II*, "to disregard the district court's finding[s] in the § 301 suit and independently make its own determinations as to whether any of the transfers or promotions between September-December 1980 constituted either a breach of the strike settlement agreement (SSA), a § 8

violation, or both" (Pet. App. 39a). Instead, the court stated, that, since "the Board previously reviewed all of the evidence, it was free to adopt the findings made by [the district court] in the remanded § 301 action" (*ibid.*).

The court held (Pet. App. 40a) that the Board had complied with the remand by determining first whether "the SSA itself was lawful and non-discriminatory within the meaning of the Act." Reaffirming its prior holding in *United II* that "the law as it existed in 1960 governs the reinstatement rights of the registered strikers" and that "the SSA accorded the strikers reinstatement rights equal to or greater than the rights governed by then-existing law," the court saw "no reason to disturb the Board's determination that the only possible violations of the Act committed by the Company during the term of the SSA involved conduct in violation of the SSA" (*id.* at 40a-41a).

The court further concluded (Pet. App. 41a) that "the Board did not err in determining that the 45 promotions and 27 unchallenged transfers which the district court held violated the SSA also violated § 8(a)(3) of the Act." The court added that, "[w]e noted in *United II* that violations of the Act could coincide with violations of a collective bargaining or strike settlement agreement" (*ibid.*, citing 534 F. 2d at 457). Rejecting the Company's contention that breaches of the SSA were merely contractual violations, the court held (Pet. App. 41a):

> [T]he 72 relevant transfers and promotions impinged the legal reinstatement rights of those unrecalled strikers which had been incorporated in the SSA. The actions had the effect of discriminating in favor of non-striking employees over unrecalled strikers. * * *

## ARGUMENT

1. The Union contends (Pet. 14-20) that the Board, in considering on remand from the court of appeals the question whether the Company's transfer, promotion, and recall

policies violated the Act, was required to reexamine all 3,320 transfers, promotions, and demotions made during the term of the SSA and could not confine itself to the 72 actions which the district court found breached the SSA.[12] The issue does not warrant review by this Court.

a. In its second decision in this case, the Board complied with a remand by the court of appeals in *United II* that permitted it to "adopt the findings made by [the district court] in the remanded § 301 action" with respect to violations of the SSA and to base its unfair labor practice determination on those findings, so long as it concluded that the SSA itself was unlawful and nondiscriminatory (Pet. App. 39a-40a).[13] The Board, correctly agreeing with the court of appeals that the SSA granted the strikers greater reinstatement rights than they possessed under the existing law[14] and

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[12]The Union takes no exception to the conclusion of the Board and the court of appeals that violations of the SSA may also constitute statutory violations, and, indeed, cites with approval (Pet. 12) the court's statement (Pet. App. 41a) that the 72 transfers and promotions found to breach the SSA "impinged the legal reinstatement rights of those unrecalled strikers which had been incorporated in the SSA" and thus violated the Act. The Union's complaint is that the Board failed to go further and assess the validity under the Act of the remaining 3,248 (3,320 less 72) transfers, demotions, and promotions which occurred during the term of the SSA.

[13]The Union's contention (Pet. 11-12 n.8, 25) that the court of appeals in *United IV* misconstrued its earlier decision in *United II* is incorrect; but, in any event, the question whether a court of appeals has correctly interpreted its own mandate does not warrant review by this Court.

[14]The Union's contention (Pet. 21-23) that the Board and the court erred in refusing to find violations of the Act based upon a retroactive application of the much later decisions in *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375 (1967), and *Laidlaw Corp.*, 171 N.L.R.B. 1366 (1968), enforced, 414 F. 2d 99 (7th Cir. 1969), cert. denied, 397 U.S. 920 (1970), is identical to a contention presented in its previous petition for certiorari in this case, No. 75-1686, 1976 Term (Pet. 17-33). For the reasons set forth in the Board's brief in opposition to that petition (Br. in Opp. 12-14), the authorities relied upon by the Union do not support its retroactivity contention.

finding that the SSA contained no discriminatory terms (*id.* at 28a), reasonably concluded that, to the extent the Company complied with the SSA, its conduct did not violate the Act. Because in its initial decision, the Board had determined, after a full review of the records in the district court and Board proceedings, (1) that the same evidence relied on to establish breaches of the SSA had been relied on by the General Counsel and the Union to establish that the Company's administration of the SSA violated the Act (192 N.L.R.B. at 384-385) and (2) that the district court's opinion furnished an exemplary analysis of the factual pattern (*id.* at 384), the Board also acted reasonably in adopting the district court's findings that the SSA had been violated only in respect to 72 transfers and promotions and in concluding that only those incidents violated the Act.

b. The Union, however, argues (Pet. 14-19) that a pre-*Fleetwood* statutory right of employees not to be discriminated against was incorporated into the SSA for all the unemployed strikers because the SSA preserved their "employee" status during its term; and the Union contends (Pet. 19-20) that the Board closed its eyes to discriminatory treatment and violated basic due process and equal protection guarantees when it found that 72 applications of the Company's policy of transferring, promoting, and demoting junior active employees to jobs in preference to recalling senior registered strikers violated the Act and disregarded the other 3,248 applications of the policy.

This contention represents an attempt to convert disagreements with the courts' and the Board's factual findings and their constructions of contract language into a constitutional issue. First, it assumes that every transfer, promotion, or demotion of a junior active employee impermissibly blocked the recall of a senior registered striker. But that assumption is contrary to findings of the district court, affirmed by the court of appeals, that strikers were not

entitled, under the terms of the SSA, to be recalled to seniority areas or occupational groups other than their own, and that therefore the district court could confine its investigation into the lawfulness of transfers, promotions, and demotions to those *within* seniority areas and occupational groups for which registered strikers were qualified (pages 4, 6-7, *supra*). It is also contrary to the findings of the court of appeals that no transfer at Pratt & Whitney could have breached the SSA (page 7, *supra*) and to the stipulation of the parties that no transfers at Hamilton Standard violated the SSA (page 10, *supra*).

Moreover, the Union fails to acknowledge that it had a full opportunity before the district court to establish breaches of the SSA (which the Board has properly equated with violations of the Act), and it was able to establish only 72 instances in which senior registered strikers were disadvantaged by the Company's transfer, promotion, and demotion policy.[15] That the Union, with the benefit of hindsight, now believes that it could establish more instances in which senior registered strikers were disadvantaged, does not entitle it to "another bite at the proverbial cherry" (*American Brake Shoe Co.* v. *NLRB*, 244 F. 2d 489, 495 (7th Cir. 1957)) in this protracted litigation, which has already gone on for more than 20 years.[16]

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[15]Indeed, before the district court, the Union apparently claimed that only 524 transfers and promotions blocked the recall of strikers. See 534 F. 2d at 439 n.23.

[16]The Union's optimistic forecast is premised on the circumstance that the Company lacked the records to sustain its burden of establishing that the 45 promotions of junior employees found to have disadvantaged senior registered strikers were made for production adjustments (Pet. 16-17). However, even if it be assumed that the Company would have a similar disability in showing that other promotions, transfers, or demotions were made for production adjustments, it does not follow, as the Union assumes, that this would prove that the Company's action violated the SSA and thus discriminated against a striker. The Union

2. Finally, the Union contends (Pet. 23-24) that non-striker absentees were accorded an unlawful preference over senior unrecalled strikers. However, the Board (Pet. App. 30a) and the court below (534 F. 2d at 445) agreed that, because those employees had been absent because of illness or for other valid personal reasons unrelated to the strike, their jobs were not "available" within the meaning of the SSA. Therefore, the Company's failure to offer those jobs to registered strikers neither breached the SSA, nor constituted discrimination within the meaning of the Act.[17]

The Union's reliance (Pet. 23-24) upon *NLRB* v. *Mackay Co.*, 304 U.S. 333 (1938), and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963), is misplaced. *Mackay* makes it clear that an employee's job is "left vacant"—in the sense that he can be permanently replaced—when he strikes. *Erie* found unlawful a grant of superseniority to strike replacements. Neither case requires a holding that an employee's job becomes available when he is briefly absent for valid personal reasons, or that the employee must bid on his job in competition with strikers merely because his absence happened to occur during a strike. As the Board stated, this result would be " 'manifestly unjust' " (Pet. App. 30a, quoting 534 F. 2d at 445).

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would first have to make a showing, which it has been unable to do except in 72 instances, that the transfer, promotion, or demotion deprived a senior registered striker of a job that he was otherwise entitled to under the terms of the SSA.

[17]The district court held (299 F. Supp. at 923) that the Company had similar legitimate business reasons for its transfer of apprentices into the bargaining unit. Because the Company had contractually committed itself to the apprentices, the court concluded that the jobs into which apprentices were placed were not "available" within the meaning of the SSA. Since the transfer of apprentices into the bargaining unit therefore did not breach the SSA, the Board properly concluded that it also did not violate the Act.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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# Petitioner's Reply Brief

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No. 81-1297

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1981

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LOCAL LODGES 743 AND 1746, INTERNATIONAL ASSOCIATION OF MACHINISTS AND AEROSPACE WORKERS, AFL-CIO,
*Petitioners,*

v.

NATIONAL LABOR RELATIONS BOARD

and

UNITED TECHNOLOGIES CORPORATION,
*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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### INTRODUCTION

The soundness of our equal protection argument is reinforced by the concurring opinions of Blackmun, J., and Powell, J., in *Logan* v. *Zimmerman Brush Co.*, No. 80-5950, decided February 24, 1982. In the instant case, the Board effectively created two classes of transfers, 72 of which it would, and 3248 of which it would not, subject to the test of discrimination enunciated for the first time by the Court of Appeals in *United II* (Pet. 5-8). This distinction was arbitrary, since the district court was precluded by limitations in the mandate to it (which the Court of Appeals predicated on mere assumptions, Pet.

6),[1] from considering whether most of the other 3248 transfers were justified as alternatives to layoff. (Pet. 4-8.) Despite the fact that the remand to the Board contained no such limitations, the Board on remand refused to apply the Court of Appeals' discrimination test to the 3248 transfers which the district court on remand had applied to the 72. The Brief in Opposition does not deny that there was this difference in mandates. Nor do that Brief, or the decisions below, even attempt to explain why the District Court's answer to the question posed to it permitted the Board to give the same answer to a different question. Accordingly, this case is governed by the reasoning of a majority of the Justices in *Logan*. The distinction drawn by the Board, because it was based on an irrelevant criterion—namely, the district court's conclusion under a far narrower mandate—is just as irrational as the classification of claimants created by the Illinois Supreme Court in *Logan*, see Opinion of Blackmun, J., p. 16; Opinion of Powell, J., p. 2.

1. The Board contends that it "acted reasonably in adopting the district court's findings that the SSA had been violated only in respect to 72 transfers and promotions and in concluding that only those incidents violated the Act." (Bd. Br. 15 citing only to the Board's original decision). But even if the Board was justified in its original decision in treating as statutory discriminatees those and only those employees whom the district court in its first decision determined to be victims of a breach of contract, it was clearly arbitrary for the Board to do so in its second decision. For the Board's deference to the district court's original decision was based on the premise that the contract issue before the court and the statutory issue before the Board were identical. But, as we have shown above and at Pet. 4-8, the question before the Board in the second decision was different from and broader than the question before the district court in its second decision (*United III*).

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[1] *Not* "findings" as the Board asserts (Bd. Br. 16). Indeed, the assumptions were repudiated in *United III* (Pet. 9).

Thus, even if, contrary to our submission (Question 1 and Pet. 18-19; 21-22), the strikers' *statutory* rights vis-a-vis the transfer policy were no greater than their contractual rights, the District Court's decision that only 72 strikers' contractual rights had been violated was based *on the assumptions underlying only the mandate to the court*, and could not "reasonably" be adopted by the Board. Again neither the Board's decision, the Court of Appeals' affirmance nor the Brief in Opposition explains why that different question should not beget an answer larger than 72.

The Brief in Opposition attributes to us the assumption "that *every* transfer, promotion, or demotion of a junior active employee impermissibly blocked the recall of a senior registered striker." (Bd. Br. 15) We do not so assume or contend. Rather, our position is that the company's policy blocked the recall of *more than 72 senior strikers* (and probably far more than 72), so that the Board acted arbitrarily, illegally, and even unconstitutionally in providing relief only to the 72 strikers identified by the District Court. On its premise that statutory and contractual rights are congruent, the Board should have determined in the unfair labor practice proceeding whether, in every case, the company's discriminatory preference policy was applied in a manner inconsistent with the contract as interpreted by the Court of Appeals. The Company presented no evidence that any blocking transfers had a business justification under the Court of Appeals' interpretation of the agreement in *United II* (see Pet. 9). As the District Court determined, with Court of Appeals' approval in *United III*, the burden of proof on this issue of business justification was with the Company (Pet., 5a-10a; 14a-16a). Thus, if the District Court's "analysis" (Bd. Br. 15) in *United III* had been followed by the Board, the Board would have been compelled to find that the Company's policy was illegal (under both the contract and the statute) in every instance where it blocked reinstatement of a striker.

How many senior registered strikers were adversely affected by the 3248 transfers would then be a matter for compliance proceedings (Pet. 14, n. 11). And the Board should have followed the district court's analysis because that analysis was squarely based on § 8(a)(3) precedent, *NLRB* v. *Great Dane Trailers*, 388 U.S. 26, 34, cited in *United III*, Pet. 9a; 16a.[2] Instead of finding the employer's policy a violation (cf. Pet. 3, n. 3), and leaving to compliance proceedings determination of how many, and which, strikers were adversely affected thereby, the Board irrationally found the policy to be unlawful only insofar as it affected the 72, who had obtained relief in the district court, and dismissed the complaint as to all the others.

2. Because of the aforesaid differences between the remand proceedings before the District Court and the Board, the contention at Bd. Br. 16 that the Union is seeking a "second bite at the cherry" is wholly without merit. Of course, the Union's submission to the District Court was circumscribed by the same limitations as the District Court's ultimate decision, but the Union was entitled to seek more comprehensive relief before the Board because of the broader mandate to it. Indeed, this argument of the Board is ultimately self-defeating, because it underscores the stark fact that the Union has not had even *one* bite at the cherry before the Board—that is, it has never had an independent assessment by

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[2] Nor did the Company in its submissions to the Board or the Court of Appeals assert that it could provide any evidence of business justification in the event of a further hearing before the Board. That application of the *Great Dane* principle would not have been unfair to the Company, as suggested in Bd. Br. 16, n. 16, was recognized by the District Court: "If the employers had wished to claim that 'production needs' dictated these promotions, then it was their burden to substantiate their claims with tangible record proof. The companies concede that they neglected to record on the change of status slips or any other personnel records which were completely under their control, any justification for the promotions [transfers and demotions (16a)] used to fill these vacancies." (Pet. 8a-9a).

that agency of the rights of the strikers (other than the 72), *on the basis of the Court of Appeals' mandate to the Board.* While the Board refers to "more than 20 years" of litigation (*id.*) it cannot rely on its first decision as a "bite at the cherry" because that decision was vacated by the Court of Appeals in *United II* with respect to the transfer policy, and in significant part because the Board had adopted the District Court's interpretation of the agreements as determinative of the strikers' statutory rights, which the Court of Appeals disapproved. And since the right to due process of law encompasses a meaningful opportunity to be heard, as *Logan* v. *Zimmerman Brush Co.*, *supra*, slip op. 10-15, also held, it was a denial of due process for the Board to decide this case by accepting as dispositive the District Court's decision which passed on the rights of only a small fraction of those who were entitledto seek relief on that theory in *United IV*.

3. The Board's Brief in Opposition nowhere deals with our submission in Question 1 and at Pet. 14-19, that as a matter of both pre- and post-1960 law the *result* reached by the Board is in conflict with all Board and judicial precedent. The Board Brief (14, n. 14) does address the question of retroactivity, that is, whether the rights of the strikers depend on the law as it existed before the events in question here in 1960. The Brief in Opposition, however, relies only on the denial of the Union's petition for certiorari in *United II*, and does not respond to our showings at Pet. 21-23, that a denial of certiorari at one stage of litigation does not preclude review of even the *same* issue at a subsequent stage, and that the present petition involves *an extension* of the retroactivity theory applied in *United States II* in such a way as to create a direct conflict with *Erie Resistor* on remand.

4. With respect to the merits of the rights of the strikers who lost jobs because of favoritism to the "inactive absentees" the Brief in Opposition seeks to dis-

tinguish *NLRB* v. *Mackay Co.*, 304 U.S. 333 (1938) and *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221 (1963).[3] While the Board states, correctly, that "*Mackay* makes it clear that an employee's job is 'left vacant'—in the sense that he can be permanently replaced—when he strikes" (Bd. Br. 17), the Board and the Court of Appeals in the instant case use the phrase "left vacant" in an entirely different sense, since the inactive absentees who returned after the strike were obviously not hired as replacements pursuant to the privilege recognized in *Mackay*. And the discussion of strikers' rights in *Erie Resistor*, 373 U.S. at 233-236, is by no means confined to the particular invasion of strikers' rights which was struck down in that case. What Bd. Br. 17 describes as "valid personal reasons" for absence cannot prevail over the exercise of § 7 rights.

The Board has not attempted, in its Brief in Opposition, or at any other time in this litigation, to reconcile its position on that issue with its hitherto uniform position that all individuals absent during a strike are to be treated equally (see Pet. 23-24) nor does the Board address *NLRB* v. *Union Carbide Corp.*, 440 F.2d 54, 56 (4 Cir.), *cert. denied*, 404 U.S. 826 (1971), which disapproved the Board's policy and held that strikers are entitled to statutory preference over nonstrikers who are absent during a strike. Indeed, the individuals to whom the Board had granted and the Court of Appeals denied relief in *Union Carbide* had been absent due to fear of crossing a picket line, the same reason asserted by many

[3] The Opposition does not deal with the inappositeness, in the light of *United III*, of readoption of the Board's approach to inactive absentees (Pet. 23). Even as the Company did not show that it would have been required to lay off any active employees but for its transfer policy, so has the Company failed to show that but for its preference for inactive absentees over unrecalled strikers any of the former would have lost their jobs. Thus, the assumption, on which the "manifestly unjust" characterization rests (Bd. Br. 17), is totally unwarranted, quite aside from its legal insufficiency.

of the inactive absentees in this case. See 534 F.2d at 444-445. Thus, the Board's present decision is in 180-degree opposition to that of the Fourth Circuit in *Union Carbide*, and represents a non-explained switch in Board policy, which the Court of Appeals in this case should have *disapproved*. See *Labor Board v. Metropolitan Ins. Co.*, 380 U.S. 438, 443, and the other cases cited in Pet. 19.[4]

## CONCLUSION

For the reasons stated on the Petition for Certiorari and herein, certiorari should be granted.

Respectfully submitted,

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[4] The Board's comment on the "apprentice" issue is purely conclusory (Bd. Br. 17, n.17) and does not detract from our submission (Pet. 24). Here again, the Board erroneously prefers a contractual to a statutory individual right.